Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

M.A.,

*Petitioner,*

v.

COLORADO, IN THE INTERESTS OF T.D., JR., AND S.D., CHILDREN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Colorado Court Of Appeals**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Adams County Department of Social Services removed petitioner's children from their home on grounds of neglect and sought to terminate petitioner's parental rights. The Department placed the children in a foster home, where petitioner's son was severely beaten. Petitioner instigated legal proceedings against the Department for its agents' negligence. Even though this civil action was ongoing, the Department declined to recuse itself from prosecuting the termination proceeding and succeeded in terminating petitioner's parental rights.

The Colorado Court of Appeals determined that the Department had a conflict of interest and should have recused itself. However, the court went on to hold that the conflict amounted to harmless error because the evidence was sufficient to support termination. The Colorado Supreme Court denied review, over the dissent of two Justices who specifically urged review of the conflict-of-interest issue.

The following question is presented:

Whether the Colorado Court of Appeals erred in holding, in conflict with *Santosky v. Kramer*, 455 U.S. 745 (1982), and decisions of this Court applying the "disinterested prosecutor" requirement, that a state agency may prosecute a case seeking the termination of parental rights despite the fact that the prosecuting agency has a conflict of interest.

## PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, T.D.—the father of petitioner's children, T.D., Jr., and S.D.—and Guardian Ad Litem Susan Street maintain interests in the proceedings.

## TABLE OF CONTENTS

**Page**

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF AUTHORITIES ..... iv

PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISION INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

REASONS FOR GRANTING THE PETITION ..... 6

THE RULING BELOW CONFLICTS WITH *SANTOSKY* AND DECISIONS OF THIS COURT APPLYING THE "DISINTERESTED PROSECUTOR" REQUIREMENT ..... 6

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Berger v. United States*, 295 U.S. 78 (1935) ..... 10

*Delaware v. Van Arsdall*, 475 U.S. 673 (1986) ..... 12

*Gagnon v. Scarpelli*, 411 U.S. 778 (1973) ..... 10

*In re K.S.*, 33 Colo. App. 72 (1973) ..... 7

*In re Murchison*, 349 U.S. 133 (1955) ..... 9

*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) ..... 8, 9

*M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) ..... 6, 8, 12

*Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) ..... 8

*Mathews v. Eldridge*, 424 U.S. 319 (1976) ..... 12

*Petition of the Department of Social Services to Dispense with Consent to Adoption*, 429 N.E.2d 685 (Mass. 1981) ..... 10

*Quilloin v. Walcott*, 434 U.S. 246 (1978) ..... 6

*Santosky v. Kramer*, 455 U.S. 745 (1982) ..... *passim*

*Troxel v. Granville*, 530 U.S. 57 (2000) ..... 6

*United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981) ..... 11

*Wheat v. United States*, 486 U.S. 153 (1988) ..... 9

*Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) ..... 9, 10

**CONSTITUTIONAL PROVISION**

U.S. Const. amend. XIV ..... *passim*

**STATUTES**

18 U.S.C. § 208(a) ..... 9

28 U.S.C. § 1257(a) ..... 1

Colo. Rev. Stat. § 19-3-604(1)(c) (2005) ..... 2, 3

## PETITION FOR A WRIT OF CERTIORARI

Petitioner M.A. respectfully submits this petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

## OPINIONS BELOW

The Colorado Court of Appeals' original opinion (App. 1a-32a) is electronically reported at 2006 Colo. App. LEXIS 635. Its modified opinion (App. 33a-65a) is reported at 140 P.3d 205. The Colorado Supreme Court's order denying review (App. 66a-67a) is electronically reported at 2006 Colo. LEXIS 576.

## JURISDICTION

The Colorado Supreme Court denied petitioner's petition for a writ of certiorari on June 26, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Constitution of the United States, U.S. Const. amend. XIV, § 1, provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

## STATEMENT OF THE CASE

This case presents questions involving the procedural due process protections that attach when the government seeks to terminate a parent's right to raise his or her child.

1. In January 2004, respondent Adams County Department of Social Services took petitioner's two children from their home in Colorado. Citing "concerns about [an] unsafe physical condition," the Department placed two-year-old T.D., Jr. and one-year-old S.D. in a foster home. App. 34a. The Department also filed a dependency and neglect petition

against petitioner and T.D., the children's father and petitioner's common-law husband. *Id.*

Petitioner visited her children in the Department's offices and quickly grew concerned for their physical safety. Among other things, she noticed bruising on her children and reported it to the Department's case worker. App. 34a, 58a. The Department disregarded petitioner's concerns, however, and the children were left in the foster home. *Id.*

Shortly thereafter, T.D., Jr. was severely beaten, suffering what the trial court described as "catastrophic, non-accidental head trauma resulting in permanent brain damage at the hands of his foster parent." App. 58a. The trial court ordered a civil and criminal investigation of the foster home. *Id.*

2. Petitioner instigated litigation against the Department for its agents' negligence in failing to remove the children from the foster home, and the resulting physical and emotional harm to T.D., Jr. App. 34a, 59a.[1] Despite this lawsuit, both the Department and the case worker who was responsible for placing the children in the foster home continued their role in the neglect proceedings. In fact, the case worker continued to supervise the implementation of petitioner's treatment plan, which set forth the Department's view of what petitioner must do if she wished to maintain her parental rights. App. 61a.[2]

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[1] The children's paternal grandmother, acting as conservator and next friend of T.D., Jr., served as the named plaintiff. The named defendants included the Adams County Department of Social Services and certain of its agents and employees.

[2] Under Colorado law, "[t]o terminate the parent-child relationship . . . , clear and convincing evidence must establish that the child has been adjudicated dependent or neglected; that an appropriate treatment plan, approved by the trial court, has not been complied with by the parent or has not been successful in rehabilitating the parent; that the parent is unfit; and that the parent's conduct or condition is unlikely to change within

In light of the Department's role in her son's injury, petitioner had difficulty working with the Department and the case worker, who told petitioner to "get over" the fact that her son had been severely beaten. App. 58a, 61a. The case worker then criticized petitioner for failing to give less than her full cooperation to the Department in the period immediately after the attack, recommending to the court in the neglect proceeding that petitioner's right to visit her children be limited in part due to her hesitancy in cooperating with the Department. App. 61a; R2 pp564-65.[3]

Petitioner, who was not represented by counsel continuously throughout these proceedings, complained that the case worker and the Department should be removed from the case. App. 58a; R7 p8; R8 pp7-9; R13 pp7-10; R14 p47. But the case worker and the Department—both facing the prospect of substantial civil liability—continued their roles in the neglect proceeding, despite the fact that they had a substantial incentive to blame petitioner for T.D. Jr.'s continuing emotional problems in order to avoid or mitigate their own liability for damages in the separate civil action that was proceeding at the same time. In fact, the case worker later admitted that she revised her reports, at the request of her supervisors in the Department, to delete references to the foster care abuse and to focus on complaints against petitioner. R14 pp47-49.

In January 2005, the Department demanded that petitioner's parental rights be terminated and succeeded in obtaining a termination order two months later. Although the trial court found that petitioner had "beg[un] to make considerable progress" in complying with the treatment plan and that by the time of the termination proceeding, "she [had] substantially complied with many components of the treat-

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[Footnote continued from previous page]

a reasonable time." App. 53a (citing Colo. Rev. Stat. § 19-3-604(1)(c) (2005)).

3 "R" refers to the trial court record. The number immediately following indicates the volume number.

ment plan for the last seven months," the court nonetheless agreed with the Department. App. 56a. It stated that "[i]t was with a tremendous sense of sadness . . . that [the court] must find [the Department] has met its burden." App. 57a.

3. Petitioner appealed, and the Colorado Court of Appeals requested supplemental briefing on the conflict-of-interest issue. The court agreed with petitioner that "the department had a conflict of interest in this case" and should have recused itself or been disqualified by the trial court. App. 58a. The court stated that "[i]t is undisputed that T.D. Jr.'s debilitating and permanent brain injury was sustained early in the proceedings at the foster home selected by the department, and that the parents, in their capacities as T.D. Jr.'s representatives, were suing the department for that injury." *Id.*

In framing the issue, the court quoted at length from one of the supplemental briefs:

> After the lawsuit was filed, the same professionals remained responsible for [petitioner] and her children in the dependency and neglect action. It goes against reason to think the parties at issue could ignore their need to defend themselves from liability in the civil action and, at the same time, work diligently toward reunifying [petitioner] with her children. In fact, the State and its employees had every incentive to try to prove that [petitioner] was unfit and that her children's problems were attributable to her alleged bad parenting.

App. 59a (quoting Supplemental Brief of T.D.).[4]

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[4] Petitioner raised the conflict-of-interest issue in the trial court. App. 71a-72a. The Colorado Court of Appeals called for supplemental briefing on the issue by order dated January 26, 2006, and petitioner filed a letter brief on February 6. The Court of Appeals issued an order affirming the termination of petitioner's parental rights on March 9, 2006. On March 20, 2006, petitioner requested rehearing, expressly contending that

The court largely agreed with this point, emphasizing that "this case involves much more than the mere pendency of litigation by a parent against the department," and expressly finding that "the parents were justified in questioning the objectivity of the department and [the case worker]." App. 61a (quotation omitted). Because of this conflict of interest, "[t]he department should have moved to withdraw and should have requested that the court appoint the department of social services in another county to proceed." *Id.*

The court concluded, however, that "[w]hile the issue is close," the conflict of interest could be overlooked because other evidence in the record was sufficient to support the termination of petitioner's parental rights. App. 53a, 55a, 61a. The court explained that "[w]hile reasonable persons may have reached a different conclusion, we conclude there is record support for the trial court's finding that [petitioner] did not successfully comply with the treatment plan and that termination was warranted." App. 57a. Thus, the court reasoned, even though the conflicted Department and its case worker had "made crucial recommendations to the court" that resulted in the termination of petitioner's parental rights, the error was harmless. App. 61a.

The court agreed that one of the consequences of its affirming the termination order was that "we are, in effect, removing [petitioner's] ability to act on behalf of [her son] in his lawsuit against the department and its employees." App. 63a.

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[Footnote continued from previous page]

the conflict of interest violated her due process rights under the Fourteenth Amendment. App. 68a-70a. On May 4, the Court of Appeals issued what it called a "substantially rewritten" opinion again affirming the termination of petitioner's parental rights, and concurrently denied rehearing. Petitioner asked the Colorado Supreme Court to review the due process issue, *see* Pet. for Cert. to Colo. S. Ct. at 7-16, but that court denied review on June 26.

The Colorado Supreme Court denied petitioner's petition for a writ of certiorari. Justices Coats and Eid dissented from the denial, stating that the court should grant review on the conflict-of-interest issue. App. 66a-67a.

## REASONS FOR GRANTING THE PETITION

The decision below conflicts with *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982), where the Court held that "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." This Court should grant review to make clear that a termination proceeding prosecuted by a state agency operating under a conflict of interest is *not* a fundamentally fair procedure.

### THE RULING BELOW CONFLICTS WITH *SANTOSKY* AND DECISIONS OF THIS COURT APPLYING THE "DISINTERESTED PROSECUTOR" REQUIREMENT

1. "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Indeed, the Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

Because "'[f]ew consequences of judicial action are so grave as the severance of natural family ties,'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (quoting *Santosky*, 455 U.S. at 787 (Rehnquist, J., dissenting)), the Court has required certain due process protections before the government can extinguish the right of a parent to raise his or her child. In *Santosky*, the Court explained that:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.

> Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state interve..tion into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

455 U.S. at 753-54.

The *Santosky* Court distinguished cases involving custody determinations from cases involving the termination of parental rights, explaining that "[w]hen the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id.* at 759. Indeed, "[f]ew forms of state action are both so severe and so irreversible." *Id.* The Court singled out Colorado's parental termination law—the exact law at issue in this case—as demonstrating how, "[f]or a child, the consequences of termination of his natural parents' rights may well be far-reaching," in that "'[t]he child loses the right of support and maintenance, for which he may thereafter be dependent on society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . ., but forever.'" *Id.* at 760 n.11 (quoting *In re K.S.*, 33 Colo. App. 72, 76 (1973)).

The Court went on to hold that a mere preponderance-of-the-evidence standard in termination cases was constitutionally insufficient given that "the consequence of an erroneous termination is the unnecessary destruction of [a] natural family." 455 U.S. at 766. Thus, "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Id.* at 747-48.

This Court has recognized other due process protections in termination cases. In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Court held that indigent parents have a constitutional right to counsel in complex termination cases. The Court recognized that terminating parental rights "work[s] a unique kind of deprivation" and thus "[a] parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is . . . a commanding one." *Id.* at 27.

Similarly, in *M.L.B.*, 519 U.S. 102, the Court held that a state could not condition appeals from trial court decisions terminating parental rights on the affected parent's ability to pay record preparation fees. The Court explained that "[i]n contrast to loss of custody, which does not sever the parent-child bond, parental status termination is irretrievably destructive of the most fundamental family relationship," and that in such cases "the risk of error . . . is considerable." *Id.* at 121 (brackets and quotation marks omitted). The Court emphasized that in termination cases, "[t]he due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action." *Id.* at 120.

2. This Court has also recognized the due process dangers that arise when a prosecutor—or other individual vested with state authority to instigate judicial proceedings—seeks to vindicate the public interest while operating under a conflict of interest. In such cases, the danger is that the state official will make decisions based on his or her personal interest in the proceeding, rather than the public interest.

In *Marshall v. Jerrico, Inc.*, the Court noted that "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." 446 U.S. 238, 249 (1980). Thus, "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at

249-50. *See also In re Murchison*, 349 U.S. 133, 136 (1955) ("Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); *cf.* 18 U.S.C. § 208(a) (federal prosecutors barred from representing government in cases in which they have a personal interest).

The Court applied the disinterested prosecutor requirement in *Young v. United States ex rel. Vuitton et Fils S.A.*, where it held that "counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order." 481 U.S. 787, 790 (1987). Because the private attorney was appointed to vindicate the public interest, the Court explained, he or she "certainly should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* at 804. Thus, "[r]egardless of whether the appointment of private counsel in this case resulted in any prosecutorial impropriety . . ., that appointment illustrates the *potential* for private interest to influence the discharge of public duty." *Id.* at 805.[5]

The same logic applies here. Given the fundamental interest at stake when a state attempts to extinguish parental rights, this Court should grant review to make clear that a state agency or employee prosecuting a parental termination proceeding must be free from conflicts of interest. In the past, this Court has looked to the due process protections applicable in similar contexts when determining the scope of protections applicable in parental termination proceedings. For example, in *Lassiter*, the Court adopted for termination proceedings the same right-to-counsel standard used in pro-

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[5] Nor may judges or court-appointed defense attorneys have a personal interest in the proceedings. *See In re Murchison*, 349 U.S. at 136 (person who charged defendant and then acted as trial judge for resulting case was not disinterested); *Wheat v. United States*, 486 U.S. 153, 158-63 (1988) (defense counsel must be unbiased).

bation-revocation hearings. *See* 452 U.S. at 31-32 (adopting standard set forth in *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

The role of Social Services in a termination proceeding is similar to the role of a prosecutor in a criminal proceeding. "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Similarly, "[i]n termination proceedings the department's professional responsibility is to protect the best interests of the child—to strengthen and encourage family life . . . . In this respect, the department has an obligation to the child, the parent, and the Commonwealth" and "must be free from private interests and from private influence." *Petition of the Dep't of Soc. Servs. to Dispense with Consent to Adoption*, 429 N.E.2d 685, 688 (Mass. 1981) (quotation omitted).

Moreover, both the prosecutor in a criminal case and Social Services in a termination case have the weight of the state behind them. As such, they are privy to resources that "dwarf[] [their opponent's] ability to mount a defense." *Santosky*, 455 U.S. at 763; *Young*, 481 U.S. at 811. In fact, Social Services possesses a power that prosecutors lack: the ability to control the events, such as developing and monitoring a treatment plan, that form the factual predicate for a termination decision. As this Court explained in *Santosky*, "the primary witnesses at the [parental termination] hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination." 455 U.S. at 763.

This case presents a particularly egregious example of the ways in which a social services department's conflict of interest can affect the outcome of a termination proceeding. Petitioner's ability to comply with the treatment plan was directly and prejudicially affected by the Department's and its case worker's continued involvement in the case. The case worker removed petitioner's son from her home, placed him in a dangerous environment where he was severely beaten, told petitioner to "get over" her son's injuries, then criticized petitioner in court proceedings for failing to follow the Department's treatment plan.

Moreover, the Department had every incentive to—and did—blame petitioner for her son's continuing psychological and emotional problems following the assault in the foster home. *See* R14 pp47-49 (case worker's admission that she revised reports, at the request of Department supervisors, to delete references to the foster care abuse and to focus on complaints against petitioner). The Department had a strong incentive to take the position in the neglect and termination proceeding that there was little or no psychological and emotional harm resulting from the foster home injury, because it knew that it faced potential civil liability arising from the foster home injury. Thus, to avoid or mitigate its own civil liability, the Department needed to prove that petitioner was an unfit parent and that she, rather than the Department, was the real cause of her son's psychological and emotional problems. *Cf. United States v. Heldt*, 668 F.2d 1238, 1276 (D.C. Cir. 1981) ("If the prosecutor's personal interest as the defendant in a civil case will be furthered by a successful criminal prosecution, the criminal defendant may be denied the impartial objective exercise of that discretion to which he is entitled.").

In sum, this case presents a classic conflict of interest in which the Department's role as an advocate of the interests of the child, the parents and the state was compromised by the threat of its own civil liability in a parallel proceeding. *See* R14 pp90-91 (case worker's testimony admitting to conflict of interest).

3. Plenary review is necessary to clarify the proper standard for evaluating conflicts of interest in parental termination cases. The Colorado Court of Appeals applied what was essentially a "harmless error" approach that overlooked the fact that the conflict was a structural defect that tainted the entire proceeding. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("some constitutional errors—such as denying a defendant the assistance of counsel at trial, or compelling him to stand trial before a trier of fact with a financial stake in the outcome—are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case"). Allowing the sufficiency of the record evidence to control misses the point that the evidence itself was tainted because it was developed and presented by a conflicted source with a personal interest in the outcome.

The Colorado Court of Appeals rejected the notion that the conflict amounted to structural error. In fact, the court did not even apply the "three distinct factors" set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for determining the nature of the process due in parental rights termination proceedings: the private interests affected by the proceeding; the risk of error created by the state's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. Application of those three factors cuts strongly in petitioner's favor, as the private interests are undeniably significant, the risk of an erroneous outcome is high, and the only possible countervailing governmental interest—avoiding the inefficiency caused by recusal—plainly cannot overcome the first two factors.

Because a termination proceeding "involv[es] the State's authority to sever permanently a parent-child bond," it "demands the close consideration the Court has long required when a family association so undeniably important is at stake." *M.L.B.*, 519 U.S. at 116-17. This Court should grant review to clarify the proper analysis in such cases.

## CONCLUSION

Just as a person may not be prosecuted by a prosecutor with a personal interest in the outcome of the case, a parent should not forever lose the right to raise his or her child at the insistence of a state agency that has a conflict of interest in the proceeding.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 25, 2006

# APPENDIX

## APPENDIX A

COLORADO COURT OF APPEALS

Court of Appeals No. 05CA0731
Adams County District Court No. 03JV762
Honorable Chris Melonakis, Judge

The People of the State of Colorado,
Petitioner-Appellee,
In the Interest of T.D., Jr. and S.D., Children,
and Concerning M.A. and T.D.,
Respondents-Appellants.

JUDGMENT AFFIRMED

Division II
Opinion by: JUDGE ROTHENBERG
Vogt and Loeb, JJ., concur

Announced: March 9, 2006

James D. Robinson, Adams County Attorney, Deborah Kershner, Assistant County Attorney, for Petitioner-Appellee,

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Bruce E. Kirkpatrick, Henderson, Colorado, for Respondent-Appellant T.D.

In this consolidated appeal, M.A. (mother) and T.D. (father) appeal from a judgment terminating their parent-child

legal relationships with their children, T.D., Jr. and S.D. We affirm.

## I. Background

In early 2004, the parents' two children were removed from the home by the Adams County Department of Social Services because of concerns about its unsafe physical condition. A dependency and neglect petition was filed, an adjudication order was entered, and the children were placed in a foster home.

During their visitations, the parents noticed bruising on the children and reported it to the department. They claim their concerns were ignored or minimized. Shortly thereafter, T.D., Jr. suffered a traumatic head injury while in foster care, which required that he be hospitalized for about a month and resulted in permanent injury. The parents testified that this event caused them considerable anguish and that, thereafter, they both had difficulty cooperating with the department in implementing their treatment plans. On behalf of T.D., Jr. they retained counsel, who filed a lawsuit against the department and certain of its employees.

The parents had separate trial counsel, and they have separate appellate counsel, who did not serve as trial counsel during the termination proceedings.

The parents' appeal was filed after the effective date of C.A.R. 3.4, which was adopted by the Colorado Supreme Court. The rule expedites appeals in dependency and neglect proceedings and makes significant changes in the way such appeals proceed in this court.

In her petition on appeal, mother challenged the constitutionality of the new rule as applied to her. She raised several issues, and we requested supplemental briefs addressing them. We later requested additional briefs from all parties addressing whether there was a conflict of interest between

the department and the parents in this case, and if so, the appropriate remedy.

## II. Constitutional Issues

Mother contends that by expediting dependency and neglect appeals, C.A.R. 3.4 interferes with her right of access to the judicial process, and violates her rights under the Due Process and Equal Protection Clauses of the federal and state constitutions. She maintains that C.A.R. 3.4 deprives her of fundamentally fair appellate review by (1) failing to provide an opportunity for full briefing in all dependency and neglect appeals; (2) requiring the court, rather than the appellant, to decide which issues require written argument; and (3) forcing appellant's counsel to rely "on an incomplete record, including an informal transcript," and therefore depriving the appellant of the effective assistance of appellate counsel. We reject each of her arguments in turn.

### A. Court of Appeals' Jurisdiction

We have found no published cases in Colorado directly resolving whether we have jurisdiction to address the constitutionality of a rule promulgated by the Colorado Supreme Court, and other states are divided on the manner in which the constitutionality of a state supreme court rule may be challenged. Although none of the parties has raised this issue, we conclude it is appropriate first to address our jurisdiction. *See Davidson Chevrolet, Inc. v. City & County of Denver*, 138 Colo. 171, 174, 330 P.2d 1116, 1118 (1958) ("Every court has judicial power to hear and decide the question of its own jurisdiction.")

Appellate courts in Florida and Tennessee have upheld the authority of the trial court or intermediate court of appeals to construe supreme court rules when applying them to given cases, but have concluded this authority does not extend to nullification of the rules. *See Ser-Nestler, Inc. v. Gen. Fin. Loan Co of Miami*, 167 So.2d 230, 232 (Fla. App.

1964) ("The Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the source of authority, they remain inviolate."); *Barger v. Brock*, 535 S.W.2d 337, 342 (Tenn. 1976) ("the inferior courts of the state may not entertain any suit or action challenging the validity of any Rule of this Court. Such a suit would be in the nature of a bill of review or to impeach a judgment of this Court.").

Other states, including Arizona, North Carolina, Ohio, and Texas, have allowed the constitutionality of a supreme court rule to be challenged in a litigated case. For example, the Texas Supreme Court upheld the jurisdiction of the state's lower courts to decide, in the first instance, the constitutionality of its rules, provided there is a real case or controversy before the court:

> Because the court's power to regulate the practice of law is an administrative one, the exercise of that power does not in and of itself deprive lower courts of general subject matter jurisdiction over challenges to that governance. They do not, however, have jurisdiction over all such challenges because in every individual case, jurisdiction also depends on justiciability. . . . [T]there must be a real controversy between the parties that will be actually resolved by the judicial relief sought.
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> . . .
>
> Had this Court actually promulgated rules establishing a pro bono program and had Gomez challenged the constitutionality of such rules, the district court would have jurisdiction to decide, in the first instance, whether such rules met constitutional standards. In due course, we would review any adverse determination in our adjudicative capacity. . . .

> Such a case would be justiciable because the district court would be capable of rendering a judgment that accords the parties complete relief, subject of course to appellate review.

*State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245-46 (Tex. 1994) (citations omitted; emphasis in original); *see also Chenault v. Phillips*, 914 S.W.2d 140, 142 (Tex. 1996) ("constitutional challenges to rules enacted by this Court must be brought in the district court and heard by this Court in the exercise of its appellate jurisdiction."); *but see Sherman v. State*, 12 S.W.3d 489, 494 (Tex. App. Dallas. 1999) (refusing to address challenge to the constitutionality of a rule promulgated by the Texas Court of Criminal Appeals, the state's court of last resort for criminal appeals, stating: "As an intermediate appellate court, we are not the appropriate forum to do so.").

In *State v. Meek*, 8 Ariz. App. 261, 445 P.2d 463 (1968), a majority of the Arizona Court of Appeals held that, as an intermediate appellate court, it lacked jurisdiction to determine the validity of rules promulgated by the Arizona Supreme Court. *State v. Meek*, 8 Ariz.App. 261, 445 P.2d 463 (1968). However, the Arizona Supreme Court, on a petition for review, remanded the case to the court of appeals "with directions to determine [the] case on [its] merits." *State v. Meek*, 9 Ariz. App. 149, 151, 450 P.2d 115, 117 (1969).

On remand, the court of appeals stated:

> This indicates to us that the Arizona Supreme Court is in accord with the statements as to this Court's position announced in the dissent of our previous opinion in *State v. Meek*. We now hold that the Arizona Court of Appeals has the power to determine the validity and constitutionality of the rules promulgated by the Arizona Supreme Court in connection with a case before us.

*State v. Meek*, *supra*, 9 Ariz. App. at 151, 450 P.2d at 117.

Similarly, in *Beard v. N.C. State Bar*, 320 N.C. 126, 128, 357 S.E.2d 694, 695 (1987), an attorney filed an action in the trial court when his license to practice law was suspended because he refused to pay into the Client Security Fund, as required by an order of the North Carolina Supreme Court. The supreme court stated that "a direct challenge of the constitutionality of an order of this Court . . . must be litigated as an original action in the General Court of Justice."

In two Ohio cases, the court of appeals simply considered the constitutionality of a supreme court rule without questioning whether it had authority to do so. *See Arrington v. Daimler Chrysler Co.*, ___ Ohio App. 3d ___, ___ N.E.2d ___ (Ohio App. Nos.22108, 22270, 22272-74, 22284-85, 22311, Dec. 22, 2004); *Shimko v. Lobe*, 152 Ohio App.3d 742, 751, 790 N.E.2d 335, 342 (2003) (court of appeals upheld constitutionality of court rule, noting that its decision was "in accord with courts in other jurisdictions which have encountered similar constitutional challenges to court rules that require attorney fee arbitration."

Some state supreme courts have expressly provided for the filing of petitions challenging their orders and rules directly with that court. *See Aldridge v. Watling Ladder Co.*, 275 Ark. 225, 628 S.W.2d 322, 323 (1982) (holding that a case involving construction of supreme court rule should have been certified to supreme court under Supreme Court Rule 29(1)(c)); *Goetz v. Harrison*, 153 Mont. 403, 457 P.2d 911, 912 (1969) (questions involving the constitutionality of a supreme court rule should "perhaps" be presented to the supreme court in an "appropriate original proceeding" or in the federal district court). Currently, Colorado has no such provision.

The Colorado Court of Appeals is a statutorily created court. Section 13-4-102, C.R.S. 2005, provides, as relevant here, that "the court of appeals shall have initial jurisdiction

over appeals from final judgments of the district courts, the probate court of the city and county of Denver, and the juvenile court of the city and county of Denver, except in ". . . (b) Cases in which a statute, a municipal charter provision, or an ordinance has been declared unconstitutional." The statute does not otherwise limit this court's authority to address constitutional issues.

*Yeager v. Quinn*, 767 P.2d 766 (Colo. App. 1988), also offers some guidance. There, judges in Boulder County Court filed a declaratory judgment in the district court regarding the validity of a directive issued by the Chief Justice of the Colorado Supreme Court, which provided for the replacement of county court reporters by electronic audio recording devices. The trial court entered summary judgment denying them preliminary injunctive relief and dismissed their complaint.

The county court judges appealed and a division of this court affirmed the district court, concluding the directive was a valid exercise of executive authority by the Chief Justice. There was no suggestion that the court of appeals lacked jurisdiction to address the validity of a Chief Justice Directive.

Later, in *Office of State Court Adm'r v. Background Info.Serv., Inc.*, 994 P.2d 420, 431(Colo. 1999), the Colorado Supreme Court rejected the contention that a Chief Justice Directive was of no effect because it was not an order or rule of the court, stating: "Chief Justice Directives . . . are policy statements promulgated pursuant to this court's general power to administer the Colorado judicial system." The supreme court cited *Yeager v. Quinn*, *supra*, with approval.

If the court of appeals has jurisdiction to address the authority of a Chief Justice Directive, which is tantamount to a court order or rule, *see Office of State Court Adm'r v. Background Info. Serv., Inc*, *supra*, it seems reasonable to conclude the court of appeals has jurisdiction to address the constitutionality of a supreme court rule. *Cf. People v. Drum*,

194 Ill.2d 485, 252 Ill. Dec. 470 (2000) (The interpretation of a supreme court rule is treated like interpretation of a statute, i.e., as a question of law that is reviewed de novo); *People v. Phillips*, 468 Mich. 583, 663 N.W.2d 463 (same).

Also, unlike cases involving attorney discipline, which are exclusively within the authority of the Colorado Supreme Court, *see Colorado Supreme Court Grievance Comm. v. District Court*, 850 P.2d 150 (Colo. 1993), the issues we address in this appeal impact only one court in Colorado -- this court -- and it is highly unlikely that a challenge to the rule would or could be raised in any forum other than this court or the Colorado Supreme Court. Indeed, a challenge to the constitutionality of C.A.R. 3.4 would be premature until a party in a dependency and neglect case has filed a notice of appeal in the court of appeals, and the supreme court is under no obligation to grant certiorari or to invoke its original jurisdiction to issue an extraordinary writ. Thus, our refusal to address this constitutional issue may mean that appellants, such as mother here, have no forum for their arguments.

Because our supreme court has not spoken to the jurisdictional issue, and for the other reasons set forth above, we therefore conclude we have jurisdiction to address mother's challenge to the constitutionality of the rule.

B. Due Process

When the state seeks to terminate the relationship between a parent and child, it must comply with the Due Process Clause, which requires a fundamentally fair procedure. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *B.B. v. People*, *supra*; *People in Interest of A.M.D.*, *supra*.

For procedural due process purposes, fairness is assessed by application of the three-factor test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), which requires consideration of three distinct fac-

tors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See C.S. v. People in Interest of I.S.*, 83 P.3d 627 (Colo. 2004); *People in Interest of A.M.D., supra.*

In *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996), the Supreme Court concluded Mississippi's requirement that an indigent mother pay for a transcript before she could appeal a decree terminating her parental rights violated her rights to due process and equal protection. The Supreme Court noted that "[d]ue process and equal protection principles converge" in cases concerning access to judicial processes, and that "[t]he due process concern hones in on the essential fairness of the state-ordered proceedings anterior to adverse state action." *M.L.B. v. S.L.J., supra*, 519 U.S. at 120, 117 S.Ct. at 565 (quoting *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2068-2069, 76 L.Ed.2d 221 (1983)).

Although the Court in *M.L.B.*, did not address *Mathews v. Eldridge, supra*, it nonetheless applied the *Matthews* three-pronged approach by identifying the private interest affected (the forced termination of mother's parental rights) and the governmental interest (the legitimate interest in offsetting the costs of its court system). The Court equated the appeal of a termination of parental rights case to the appeal of a petty offense, and relying on *Mayer v. Chicago*, 404 U.S. 189, 198, 92 S.Ct. 410, 416 (1971), held that "Mississippi may not withhold from M.L.B. 'a record of sufficient completeness' to permit proper [appellate] consideration of [her] claims." *M.L.B. v. S.L.J., supra*, 519 U.S. at 128, 117 S.Ct. at 570.

In this case, it is undisputed that parents have a fundamental liberty interest in the care, custody, and management of their children, *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *B.B. v. People*, 785 P.2d 132 (Colo. 1990); *People in Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982); and both parents and children have an important interest in a continuing family relationship. *See People in Interest of A.M.D., supra*; *People in Interest of C.A.K.*, 652 P.2d 603 (Colo. 1982).

However, the state also has a significant interest in finalizing a dependency and neglect proceeding in an expeditious manner to meet the child's emotional and psychological needs for a permanent home. *See* § 19-1-102(1.6), C.R.S. 2005.

We conclude that the private interests of a parent who is affected by an appellate proceeding, while extremely important, do not outweigh the state's interests in protecting the safety and other needs of children in dependency and neglect cases. Therefore, in order to resolve the due process issue, we consider the risk of an erroneous deprivation of mother's appellate rights and the probable value, if any, of additional or substitute procedural safeguards. *See Mathews v. Eldridge, supra.*

There is no constitutional right to appeal, *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), but once a state has created such a statutory right, the procedures afforded to secure that right must comport with due process and equal protection. *M.L.B. v. S.L.J., supra*; *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts"); *People v. Rivera-Bottzeck*, 119 P.3d 546 (Colo. App. 2004).

Colorado has created a statutory right to appeal in dependency and neglect proceedings. Section 19-1-109(1)-(2), C.R.S. 2005.

The Colorado Supreme Court adopted C.A.R. 3.4 in response to the federal and state law shift in focus from family reunification to "time-limited family reunification services." *See* 42 U.S.C. §§ 629a(7), 675(5) (2000); §§ 19-1-102(1.6), 19-1-109(3), 19-1-115(7), 19-1-123, 19-3-100.5, 19-3-604(2)(k), 19-3-702, 19-3-703, C.R.S. 2005. Section 19-1-109(3) created a "Child Welfare Appeals Workgroup" to submit a written report to the General Assembly to consider necessary statutory or other changes. The goal of the legislature was to ensure that appeals in dependency and neglect cases be completed within six months after being filed. *See People in Interest of A.J.H*, ___ P.3d ___ (Colo. No.05CA1129, Feb. 23, 2006).

Retired court of appeals judge, Karen S. Metzger, and Judge Karen M. Ashby, Chief Judge of the Denver Juvenile Court, are the co-chairs of the Court Improvement Committee, a proponent of the rule. Both of them appeared at a public hearing before the Colorado Supreme Court on January 25, 2005, concerning the proposed rule and explained that it is modeled on a rule adopted in Iowa. *See In re C.M.*, 652 N.W.2d 204 (Iowa 2002) (applying similar Iowa appellate rule); *In re R.K.*, 649 N.W.2d 18 (Iowa 2002) (same).

Judge Metzger stated that, based on case studies, approximately 100 dependency and neglect cases per year were filed in the court of appeals, and that it then took one year from the filing of the notice of appeal until the mandate issued. Judge Metzger further stated: "The proposed rule 3.4 does not change the substantive, qualitative analysis for these kinds of appeals. Instead, it's the belief of the Court Improvement Committee . . . that it does what federal and state law mandates us to do, quite candidly, move cases expedi-

tiously through the system." Tape recording of public hearing before the Colorado Supreme Court on January 25, 2005.

C.A.R. 3.4 requires an appellant to file a petition raising issues for appeal, instead of arguing issues as in a traditional brief. C.A.R. 3.4(g)(3). The petition is due within twenty days of the filing of the notice of appeal, C.A.R. 3.4(g)(1), and the opposing party has twenty days thereafter to file a response. C.A.R. 3.4(h)(1). The record on appeal, which includes designated transcripts of hearings before the trial court, *see* C.A.R. 3.4(e)(3), must be transmitted to the court of appeals within forty days of the filing of the notice appeal. C.A.R. 3.4(f)(1).

Some, but not all judicial districts in Colorado, currently have the technology to prepare transcripts quickly. Hence, in some cases, the new rule's filing requirements may preclude the use of the complete record by appellate counsel in preparation of the petition or response, as occurred here where mother relied on an "informal transcript."

Nevertheless, the rule provides that the parties may request a copy of an unedited transcript from the court reporter, giving appellate counsel the opportunity to identify the issues for review, to summarize the relevant facts, and to provide supporting legal authority, see C.A.R. 3.4(e)(6). While that opportunity admittedly depends on the quality of the unedited transcript, the rule does not prevent counsel from requesting leave to supplement the petition or response, if an examination of the completed record convinces counsel that manifest injustice would otherwise result. C.A.R. 3.4(i) also allows appellate counsel to request oral argument, and C.A.R. 3.4(k)(1) provides for a petition for rehearing.

After the required documents are filed, the court of appeals -- acting through one of its three-judge divisions -- then reviews the petition on appeal, any responses to the petition, and the trial court record. The assigned division, which has access to the completed record, is responsible for verifying

appellate counsel's statement of facts and application of the law to the facts.

The division may affirm, reverse, or vacate the trial court's decision, remand the case to the trial court, or request supplemental briefing by the parties addressing issues raised by them or noticed by the division itself. C.A.R. 3.4(j)(2). Although the authority to request supplemental briefing is explicit in the new rule, it is not a new practice. Divisions of this court have requested counsel to address issues noticed by the division in numerous civil, criminal, and administrative cases. *See, e.g., People v. Krutsinger*, 121 P.3d 318 (Colo. App. 2005); *People v. Turley*, 109 P.3d 1025 (Colo. App. 2004); *Roberts v. American Family Mut. Ins. Co.*, 113 P.3d 164 (Colo. App. 2004).

The rule requires that the proceedings be advanced on the court of appeals' calendar. C.A.R. 3.4(j)(1). Thus, the division must promptly affirm the order of termination and free the child for adoption, or reverse the order and allow the reunification of the child and parents. This expedited procedure benefits the parents by quickly correcting decisions in which their rights were terminated erroneously. The expedited procedure also benefits children, whose parents have had their rights terminated by the trial court, by decreasing the time they are in "legal limbo" and either returning them to their parents or permitting legal adoption. *See In re C.M., supra*; *In re R.K., supra*. Accordingly, the latter benefit furthers the state's interest in protecting children.

Apart from her challenge to the quality and the timeliness of the informal transcripts, mother also contends the rule violates due process because it improperly requires an appellant to make a preliminary showing that the appeal is meritorious. Alternatively, she maintains that the rule forces the members of the division to prejudge the appeal in deciding when to order supplemental briefs. We disagree.

A considerable number of the appeals from termination cases challenge the sufficiency of the evidence, the adequacy of the treatment plan, and the existence of less drastic alternatives to termination. These challenges are to the factual, not the legal, determinations made by the trial court, and they require the division to examine the record for any support of the trial court's findings. Under the new rule, the division can do so because it has the entire record before issuing a decision.

Relatively few appeals raise purely legal issues or complex factual issues that cannot be resolved by established precedent. The issues raised in such cases require a more thorough analysis by counsel and the division. The rule allows the division to order supplemental briefing in such cases, indeed, in all cases, and thus provides the parties such an opportunity.

Thus, the expedited process does not alter the division's responsibility to examine thoroughly the record on factual issues, and contrary to mother's contention, it does not place the division in the role of an advocate on legal issues.

We acknowledge that the new rule is not perfect. *See In Interest of N.A.T*, ___ P.3d ___ (Colo. No. 05CA1512, Mar. __, 2006) (Román, J., dissenting). However, in assessing the risk of erroneous deprivation the new rule may cause, we bear in mind that parents in a termination case have already been afforded the full panoply of due process rights in the trial court.

Our job is not to second-guess the factual decisions of the trial court or interfere with the exercise of its discretion. The duty of an appellate court is to review the record for legal error and to correct such error if it affected the fairness and outcome of the proceedings. *See* C.R.C.P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the sub-

stantial rights of the parties."). The new rule does not prevent us from performing this duty.

In summary, we reject mother's contention that the accuracy of the transcript initially available to her, the timeliness of the complete transcript, and the expedited process in which the assigned division reviews the appeal and reaches its decision, violate her right to procedural due process. We conclude that she was provided with a record of sufficient completeness to permit proper consideration of her claims on appeal, *M.L.B. v. S.L.J.*, *supra*, 519 U.S. at 128, 117 S.Ct. at 570, and that the new rule sufficiently protects parents in dependency and neglect cases against the risk of an erroneous deprivation of their appellate rights (1) by allowing appellate counsel for the parents a reasonable opportunity to review an unedited transcript and to raise possible issues for appeal, and (2) by allowing the assigned division of the court of appeals to review the complete record and order supplemental briefing when appropriate. *See Mathews v. Eldridge*, *supra*; *In re R.K.*, *supra* (concluding Iowa's expedited appellate procedure in termination appeals does not violate a parent's right to due process); *see also United States v. Marines*, 535 F.2d 552 (10th Cir. 1976) (concluding court's summary calendar, which permits more limited briefing, does not violate due process as long as defendant is able properly to present issues on appeal); *People v. Rivera-Bottzeck*, *supra* (concluding that limiting the length of a defendant's brief on appeal did not violate his right to due process where he was not forced to abandon any issues).

In reaching our conclusion that mother's constitutional right to due process was not violated by the expedited procedure required under C.A.R. 3.4, we also observe that there are several ways in which trial courts can alleviate the problems raised by counsel in this appeal and assist this court in performing its function.

For example, the trial court can (1) identify in its findings and written order any difficult or novel legal issues that arose during the proceedings; (2) require that before trial counsel is permitted to withdraw and be replaced by a different appellate counsel, trial counsel file a written statement identifying any difficult or novel legal issues that arose during the proceedings; and (3) require that trial counsel personally confer with appellate counsel shortly after filing the notice of appeal to assist in identifying issues on appeal.

The trial court can also alleviate appellate delay by reducing its oral findings and conclusions to writing immediately. Counsel cannot file a notice of appeal until there is a final judgment, which requires a written and signed order by the trial court. *See* C.R.C.P. 58(a). Further, the trial court can ensure that there is no delay by the clerk's office in assigning a court reporter to prepare the record.

C. Equal Protection

Mother also contends C.A.R. 3.4 violates her constitutional right to equal protection under U.S. Const. amend. XIV and Colo. Const. art. II, § 25, because parents whose rights are terminated under article 5 of the Colorado Children's Code, *see* §§ 19-5-105, 19-5-203, C.R.S. 2005, are not subject to the expedited appellate procedure set forth in the rule, nor are those parents whose custodial rights are affected in other civil actions. We conclude those parents are not similarly situated and therefore reject mother's argument.

Equal protection of the law requires that the government treat similarly situated persons in a similar manner. A distinction between classes or groups of people, whether created by a statute or rule, must have some relevance to the purpose for which the classification is made. When governmental action is subjected to an equal protection challenge, the level of judicial scrutiny varies with the type of classification employed and the nature of the right affected. *Tassian v. People*, 731 P.2d 672, 574 (Colo. 1987).

To state an equal protection violation, a person must establish that he or she received treatment different from that afforded to similarly situated persons. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003). Thus, the threshold question in any equal protection challenge is whether the persons allegedly subject to disparate treatment are in fact similarly situated. If they are not, the equal protection challenge must fail. *See People v. Watkins*, 126 P.3d 309 (Colo. App. 2005).

The overriding purpose of the Children's Code is to protect the welfare and safety of children by providing a procedure through which their best interests can be served. *L.G. v. People*, 890 P.2d 647 (Colo. 1995).

The distinction created by C.A.R. 3.4 is between parents subject to dependency and neglect proceedings under article 3 of the Colorado Children's Code and parents subject to relinquishment and adoption proceedings under article 5 of the Code or other civil proceedings that may affect their parental rights.

However, dependency and neglect proceedings focus primarily on the protection and safety of children susceptible to harm from the effects of abuse and neglect, not on the custodial interests of the parent. *L.G. v. People*, *supra*; *People in Interest of C.M.*, 116 P.3d 1278 (Colo. App. 2005). In such proceedings, an order affecting a parent's custodial rights may not be made until after the children have been adjudicated, which requires a determination that the children's custodial circumstances or other aspects of their environment are detrimental to them and must be altered. *L.A.G. v. People in Interest of A.A.G.*, 912 P.2d 1385 (Colo. 1996); *People in Interest of C.M.*, *supra*.

Further, a proceeding in dependency and neglect may only be initiated by the state, *L.A.G. v. People in Interest of A.A.G.*, *supra*; *L.G. v People*, *supra*, which has a compelling interest in the speedy, permanent disposition of a child who has been adjudicated dependent and neglected. *See* §§ 19-1-

102(1.6), 19-1-109(3), 19-1-115(7), 19-1-123, 19-3-100.5, 19-3-604(2)(k), 19-3-702, 19-3-703; *People in Interest of E.I.C., supra.*

Although stepparent adoptions and relinquishment proceedings may result in the involuntary termination of a parent's rights, *see* §§ 19-5-105(3.1), 19-5-203(1)(j)-(k), C.R.S. 2005, they are not initiated by the state, and the state is not a party to the proceedings. Nor is the state a party to other civil proceedings, such as dissolution of marriage or grandparent visitation proceedings under the Uniform Dissolution of Marriage Act (UDMA), § 14-10-101, et seq., C.R.S. 2005, in which a parent's custodial rights might be affected. Further, proceedings under article 5 of the Code or under the UDMA generally do not involve a situation where the child is exposed to an injurious environment. *See* § 19-5-100.2, C.R.S. 2005; *L.A.G. v. People in Interest of A.A.G., supra.*

We therefore conclude that parents, such as mother, whose rights are involuntarily terminated in a dependency and neglect proceeding pursuant to article 3 of the Children's Code, are not similarly situated with parents whose rights are terminated under article 5 of the Code. *See* §§ 19-5-105, 19-5-203, C.R.S. 2005. Thus, mother has not established the threshold requirement for an equal protection challenge.

D. Effective Assistance of Counsel

Mother next contends C.A.R. 3.4 violates the federal and state constitutional right to effective assistance of counsel because the lack of a complete record prevents appellate counsel from adequately developing and presenting the issues on appeal. We are not persuaded.

Once counsel is appointed, a parent is entitled to effective assistance, *S.S. v. Wakefield*, 764 P.2d 70 (Colo. 1988), and the standards used to assess effective assistance in a criminal case apply. *People in Interest of V.M.R.*, 768 P.2d 1268 (Colo. App. 1989).

To establish a claim of ineffective assistance of counsel, a parent must show that counsel's performance fell below the level of reasonably competent assistance and that counsel's deficient performance was so prejudicial as to deprive the parent of a fair hearing. *People in Interest of V.M.R., supra.*

As discussed, C.A.R. 3.4 provides access to an unedited transcript for preparation of the petition on appeal and an opportunity to identify the issues on appeal. Verification of counsel's statement of facts is undertaken by the assigned division of the court of appeals, after the complete transcript has been filed. The division must apply the appropriate legal authority cited by counsel to the verified facts in deciding the issues raised in the petition. The division may also undertake its own supplemental research, and order further briefing on any issues.

Here, there has been no showing that the unavailability of the complete record under C.A.R. 3.4 resulted in a deficient performance by appellate counsel. *See People In interest of N.A.T., supra*; *In re L.M.*, 654 N.W.2d 502 (Iowa 2002) (holding that under the similar Iowa rule, the shortened time for filing a petition on appeal, which precludes review of the transcript, does not give rise to a per se claim of ineffective assistance of counsel). In our view, all appellate counsel have done an excellent job of identifying and addressing the issues in this appeal.

III. Withdrawal of Mother's Counsel

Mother next contends the trial court erred in allowing her court-appointed trial counsel to withdraw. We disagree.

A parent has a statutory, not a constitutional, right to appointed counsel in a dependency and neglect proceeding, §§ 19-1-105(2), 19-3-202(1), 19-3-602(2), C.R.S. 2005; *C.S. v. People in Interest of I.S., supra*, and it must be invoked by the parent's timely request for appointed counsel. *People in Interest of L.L.*, 715 P.2d 334 (Colo. 1986); *People in Inter-*

*est of L.A.C.*, 97 P.3d 363 (Colo. App. 2004); *People in Interest of V.W.*, 958 P.2d 1132 (Colo. App. 1998).

Here, counsel was appointed to represent mother shortly after the petition in dependency and neglect was filed. Six months later, she asked her counsel to withdraw. She informed the court that she was dissatisfied with counsel's performance and that she intended to hire private counsel. The court found there was a conflict between mother and counsel and allowed counsel to withdraw. Mother proceeded pro se for over two months, despite the trial court's repeated suggestions that new counsel be appointed. When the department of social services expressed its intention to pursue termination, the trial court advised mother that it was perilous to proceed without counsel, and she then requested and received another appointed counsel.

We therefore perceive no error in the trial court's order allowing counsel to withdraw, and we reject mother's contention that her statutory right to court-appointed counsel was violated.

IV. Insufficiency of Motion to Terminate

We also reject mother's argument that the motion to terminate her parental rights was insufficient because it failed to specify the factual grounds for termination. A motion to terminate is sufficient so long as it is couched in the statutory language set forth in § 19-3-604(1), C.R.S. 2005, as it was here. *See People in Interest of C.A.J.*, 709 P.2d 604 (Colo. App. 1985); *People in Interest of M.H.*, 683 P.2d 807 (Colo. App. 1984).

V. Sufficiency of the Evidence

Both parents contend the evidence was insufficient to support the criteria for termination. We disagree.

To terminate the parent-child legal relationship pursuant to § 19-3-604(1)(c), C.R.S. 2005, clear and convincing evi-

dence must establish that the child has been adjudicated dependent or neglected; that an appropriate treatment plan, approved by the trial court, has not been complied with by the parent or has not been successful in rehabilitating the parent; that the parent is unfit; and that the parent's conduct or condition is unlikely to change within a reasonable time. *People in Interest of A.M.D., supra.*

When appropriate, the department must make reasonable efforts to reunify the family. Section 19-3-100.5(1); *see* § 19-3-604(2)(h), (k)(III), C.R.S. 2005. "Reasonable efforts" means the exercise of diligence and care for children who are placed out of the home, but the primary considerations in a termination proceeding are the physical, mental, and emotional conditions and needs of the children. Section 19-3-604(3), C.R.S. 2005; *People in Interest of D.B-J.*, 89 P.3d 530 (Colo. App. 2004); § 19-3-604(3), C.R.S. 2005.

The reasonable efforts standard is met if services are provided in accordance with § 19-3-208, C.R.S. 2005. *See* § 19-3-100.5(4), C.R.S. 2005. Among the efforts required of the department are an assessment of the family, development of a case plan for the provision of services, and visitation services. Section 19-3-208.

A. Adequacy of the Treatment Plan

The parents contend the trial court erred in finding the treatment plan was appropriate. We disagree.

A treatment plan is appropriate if it "is reasonably calculated to render the particular [parent] fit to provide adequate parenting to the child within a reasonable time" and "relates to the child's needs." Section 19-1-103(10), C.R.S. 2005.

The purpose of a treatment plan is to preserve the parent-child relationship by assisting the parent in overcoming the problems that led to the dependency adjudication. Its appropriateness is measured by the likelihood of success in reuniting the family, which must be assessed in light of the facts

existing at the time of its approval. *People in Interest of M.M.*, 726 P.2d 1108 (Colo. App. 1986).

Absolute compliance with a treatment plan is not required. *See People in Interest of C.L.I.*, 710 P.2d 1183 (Colo. App. 1985). On the other hand, partial or even substantial compliance with a plan may still not result in success if it does not correct or improve the parent's conduct or condition. *People in Interest of D.L.C.*, 70 P.3d 584 (Colo. App. 2003); *see People in Interest of C.A.K., supra.*

Where, as here, the proceedings concern a child under the age of six, § 19-3-604(1)(c)(I)(B), C.R.S. 2005, provides that the treatment plan is not successful if:

> [t]he parent exhibits the same problems addressed in the treatment plan without adequate improvement, including but not limited to improvement in the relationship with the child, and is unable or unwilling to provide nurturing and safe parenting sufficiently adequate to meet the child's physical, emotional, and mental health needs and conditions.

In making its findings, the trial court must consider the totality of the evidence, *People in Interest of J.E.B.*, 854 P.2d 1372 (Colo. App. 1993), and it should attribute more weight to the most recent reports and evaluations. *People in Interest of L.D.*, 671 P.2d 940 (Colo. 1983); *People in Interest of V.W., supra.*

The credibility of the witnesses and the sufficiency, probative effect, and weight of the evidence, as well as the inferences and conclusions to be drawn from it, are within the discretion of the trial court. A trial court's findings and conclusions will not be disturbed on review if the record supports them. *People in Interest of C.A.K., supra.*

In this case, the court approved a treatment plan requiring that the parents (1) complete hair follicle tests to detect

drug use and undergo substance abuse evaluations if the tests were positive; (2) attend supervised visits with the children; (3) maintain employment; (4) participate in domestic violence evaluations and follow any recommendations; and (5) participate in psychological evaluations. The treatment plan thus attempted to address the problems that required the initial intervention and related to the children's need for a safe home.

1. Father's Treatment Plan

Father generally asserts that the trial court's findings concerning the criteria for termination were not supported by clear and convincing evidence. We disagree.

Father lacks standing to raise issues concerning termination of mother's rights. *See People in Interest of J.M.B.*, 60 P.3d 790 (Colo. App. 2002). Thus, we address his contentions only insofar as they concern the termination of his own parental rights.

Father's treatment plan was identical to mother's, which was designed to address the family's problems. However, his anger toward the department, while understandable, remained so intense and unabated as to completely interfere with his compliance with the plan. He shaved his head and body to delay the hair follicle test, refused to participate in domestic violence counseling, and did not follow through with mental health treatment as recommended by his psychological evaluation.

At the time of the termination hearing, he had not completed a single therapeutic component of the treatment plan, and he exhibited the same problems as those initially addressed by the treatment plan. The court thus found, with record support, that he was unable or unwilling to provide nurturing and safe parenting to the children. *See* § 19-3-604(1)(c)(I)(B), C.R.S. 2005. Pointing to father's history of violence, his repeated threats of harm to the social worker,

and his failure to make any progress, the court found that he was unfit and that his conduct or condition was unlikely to change within a reasonable time.

We conclude the evidence was sufficient to support the trial court's findings as to father, and they may not be disturbed on review. *See People in Interest of C.A.K., supra.*

2. Mother's Treatment Plan

Mother's situation was considerably different from that of father. Although she initially was uncooperative and did not begin to comply consistently until six months after the treatment plan had been approved by the trial court, she then began to make considerable progress. By the time of the termination hearing, the court found that "she [had] substantially complied with many components of the treatment plan for the last seven months." She had separated from father and was living in a shelter, but she was also pregnant with a third child by father.

The trial court found that while the separation was indicative of improvement, mother still maintained frequent contact with father, who had not addressed the domestic violence issues. Because of this, the court was concerned that the separation was not permanent and that the addition of a third child would frustrate mother's ability to meet the children's needs. After reviewing all of the evidence and making extensive findings, the trial court stated that "[i]t was with a tremendous sense of sadness . . . that it must find [the department] has met its burden."

While reasonable persons may have reached a different conclusion, we conclude there is record support for the trial court's finding that mother did not successfully comply with the treatment plan and that termination was warranted. Therefore, those findings may not be disturbed on review. *See People in Interest of C.A.K., supra.*

In reaching our conclusion, we reject mother's assertion that the separation of the children from her was not in their best interests and that the treatment plan did not relate to the children's needs. The order placing the children out of the home was separate from the treatment plan, which addressed the problems that required intervention into the family and related to the children's need for a safe home, free from substance abuse and domestic violence. Further, mother did not object to the treatment plan.

Accordingly, we reject mother's contention that the treatment plan was inappropriate. *See Interest of M.S.-and K.C.S.*, ___ P.3d ___ (Colo. No.05CA 1428, Dec. 15, 2005) (concluding father was precluded from challenging the appropriateness of his treatment plan because he stipulated to it and failed to request modification).

B. Department's Reasonable Efforts and Conflict of Interest with Parents

The parents also contend the department failed to make reasonable efforts to reunite the family after T.D., Jr. suffered a traumatic head injury while in foster care. They maintain that the department should have been removed from this case because it had a conflict of interest with the parents. We conclude there is record support for the trial court's finding that the department made reasonable efforts to reunite the family after T.D., Jr. suffered the injury. We further conclude the department had a conflict of interest in this case but the fact that the trial court sua sponte did not disqualify the department does not require reversal of the judgment.

The department denies that it had such a conflict. We are not persuaded. It is undisputed that T.D. Jr.'s debilitating and permanent brain injury was sustained early in the proceedings at the foster home selected by the department, and that the parents, in their capacities as T.D. Jr.'s representatives, were suing the department for that injury. The trial court was incensed when it learned the child had suffered in-

juries while in foster care. At a hearing early in the proceedings, the court found that on February 2, 2004, T.D. Jr. had "suffered catastrophic, non-accidental head trauma resulting in permanent brain damage at the hands of his foster parent," and it ordered a criminal and civil investigation of the foster home. S.D. was moved to another foster home, as was T.D. Jr. when he was released from the hospital.

Further, there was evidence that before this incident occurred, the parents had complained to the social worker assigned to their case about that foster home and had reported seeing bruises on both of the children. The parents maintain that the social worker disregarded their complaints and that their relationship with the department deteriorated significantly after their son was injured. They were very distrustful of the department and livid about their child's injury, and both parents became uncooperative. Father was openly hostile to the social worker and others in the department.

The court was informed by the parents' counsel that a civil suit had been filed against the department for the physical and emotional harm done to the children while in the abusive foster home. As father asserted in his supplemental brief:

> After the lawsuit was filed, the same professionals remained responsible for [mother] and her children in the dependency and neglect action. It goes against reason to think the parties at issue could ignore their need to defend themselves from liability in the civil action and, at the same time, work diligently toward reunifying [mother] with her children. In fact, the State and its employees had every incentive to try to prove that [mother] was unfit and that her children's problems were attributable to her alleged bad parenting. For this additional reason, [mother] must be able to press

> her appeal in as full and effective a manner as possible so that this [c]ourt can exercise the oversight function to which M.A. is entitled.

In *People in Interest of J.A.M.*, 907 P.2d 725 (Colo. App. 1995), a division of this court reversed a judgment of the juvenile court terminating a parent-child relationship, concluding that the child's guardian ad litem should have been disqualified from the proceedings. The division reasoned:

> [D]uring the permanency planning hearing, the GAL recommended termination of the parent-child legal relationship, as did the Department, and stated that she had arrived at her position independently. However, the independent judgment of the GAL could have been compromised by her employment with the Department.
>
> Furthermore, the conflict of loyalties inherent in the GAL's dual roles as a representative of the child's best interests and as an employee of the Department necessarily casts doubt on the fairness and impartiality of the legal system in the public eye.
>
> For these reasons, we conclude that the juvenile court erred in failing to disqualify the GAL.

*People in Interest of J.A.M.*, *supra*, 907 P.2d at 726 (citations omitted).

Likewise, in *Petition of Department of Social Services to Dispense with Consent to Adoption*, 429 N.E.2d 685 (Mass. 1981), the Massachusetts court disqualified the department of social services from presenting the Commonwealth's cases, where department employees sought to become preadoptive parents. The court explained that the department has "vastly superior resources for investigation and presentation of its

case," that "judges place great confidence in the reports of the department," and therefore, that "the department is extraordinarily influential in its capacity to interfere with family relationships between parents and children." *Petition of Dep't of Soc. Servs.*, *supra*, 429 N.E.2d at 688 (quoting *Dep't of Pub. Welfare v. J.K.B.*, 393 N.E.2d 406, 408 (Mass. 1979)); *see also In re S.D.A.*, 612 S.E.2d 362, 365 n4 (N.C. Ct. App. 2005) (noting that the "North Carolina Division of Social Services Family Services Manual also permits referral to a sister county when a conflict of interest exists.").

We agree with the statement of the court in *In re Eduardo*, 782 N.E.2d 551, 553 (Mass. App. Ct. 2003), that "[t]here need be no per se rule that the mere pendency of litigation by a parent against DSS requires disqualification of DSS as an advocate against that parent in a custody case." As the Massachusetts court observed, "such an inflexible approach is not required to preserve the integrity of the process and could lead to undesirable litigation strategies." *In re Eduardo*, *supra*, 782 N.E.2d at 553.

However, this case involves much more than "the mere pendency of litigation by a parent," against the department. The parents' lawsuit in this case was filed on behalf of T.D., Jr. and the department's actions seeking to terminate their rights, if successful, would affect their ability to act on his behalf in T.D., Jr.'s lawsuit. We thus conclude there was a conflict of interest between the department and the parents. The department should have moved to withdraw and should have requested that the court appoint the department of social services in another county to proceed. In no event should the same social worker have remained on this case.

The appearance of fairness is just as important as the reality of fairness. As we have observed, there was evidence showing the department made considerable efforts to engage the parents in treatment and to provide the services ordered by the court and required under the treatment plan. But there

was also evidence that the department's employees, who oversaw mother's treatment plan, told her to "get over" the issue of T.D. Jr.'s brain injury, were critical of her when she failed to cooperate or participate with the department for five months after he was injured, and made crucial recommendations to the court, including that the parents' visitation be limited. Thus, the parents were justified in questioning the objectivity of the department and the social worker.

While the issue is close, we nevertheless conclude reversal is not warranted for the following reasons. First, when the court learned of the child's injury, it ordered the department to provide all reasonable services requested by the parents to facilitate their treatment plans. Among the services provided were supervised and therapeutic visits, domestic violence counseling, substance abuse treatment, and psychological treatment for the parents and the children. The court also appointed a special advocate (CASA volunteer) to provide an independent review of the case and to speak on behalf of the best interests of the children. *See* § 19-1-201, et seq., C.R.S. 2005. Hence, the department was monitored very closely by the trial court.

Mother participated in these services, but unfortunately waited until five months after the child was injured to begin her treatment plan in earnest. *See People in Interest of L.A.C., supra.*

Second, the trial court granted every request made by the parents' counsel. When mother's counsel first informed the court of the conflict, she asked that an independent expert be appointed, and the court stated that it had already done so. Third, while mother's counsel indicated to the court her intent to file a "formal" request of some kind, and father's counsel also raised the issue, neither counsel ever moved to disqualify the department or sought to preclude department employees from testifying at any of the hearings.

Fourth, the trial court's order, issued after the termination hearing, makes it clear that the court primarily relied on the independent expert it had appointed, and did not rely on the social worker. The court also noted that throughout much of the proceedings, the expert and the CASA volunteer had consistently advocated for the parents and they did not uncritically accept the department's recommendations. And fifth, much of the department's evidence regarding the mother's ability to parent the children was corroborated by the testimony of mother's therapist and the children's therapist.

We conclude there is record support for the trial court's finding that the department made reasonable efforts to reunite the family. We further conclude the trial court's failure sua sponte to disqualify the department based on a conflict of interest does not require reversal.

In reaching our conclusion, we have not overlooked the parents' observation that by affirming the judgment, we are, in effect, removing their ability to act on behalf of the child in his lawsuit against the department and its employees. We assume the child's guardian ad litem will bring this matter to the attention of the juvenile court and request an order clarifying who now has standing to act on behalf of the minor child in that civil action.

VII. Suspension of Visits Without Hearing

Mother also complains that the trial court suspended her visits with the children nine months before the termination hearing without conducting an evidentiary hearing. She asserts that the trial court improperly delegated the decision to resume visitation to the children's therapist and the independent therapeutic visit supervisor.

However, the visits were suspended after a review hearing, and the court considered the recommendations of the children's therapist and the therapeutic visit supervisor.

These recommendations were presented to the court by the department and the guardian ad litem. Mother did not object to the procedure followed by the trial court, did not ask that an evidentiary hearing be conducted, and did not object to the trial court's delegation of authority to reinstate visits.

We therefore conclude her arguments were not properly preserved for appeal. *See People in Interest of V.W., supra*; *see also People in Interest of B.C.*, 122 P.3d 1067 (Colo. App. 2005).

VIII. Less Drastic Alternative

Finally, the parents contend the trial court erred in rejecting permanent placement of the children with family friends in North Carolina as a less drastic alternative to termination. Mother argues that the finding was based on an error concerning North Carolina law and that the trial court could have imposed protective orders to resolve the perceived problems. We disagree.

The court must also consider less drastic alternatives before entering an order of termination. *C.S. v. People in Interest of I.S., supra*; *People in Interest of M.M., supra*. The primary considerations in a termination proceeding are the physical, mental, and emotional conditions and needs of the child. Section 19-3-604(3); *People in Interest of D.B-J., supra*.

Permanent placement is not a viable alternative to termination if the proposed caregiver lacks appreciation of the parent's problems or of the child's conditions or needs. *See People in Interest of D.B-J., supra*. Permanent placement is also foreclosed if the child needs the stability and permanency of adoption. *People in Interest of E.I.C., supra*; *People in Interest of S.T.*, 678 P.2d 1054 (Colo. App. 1983).

According to the home study conducted pursuant to the Interstate Compact on Placement of Children, § 24-60-1801, et seq., C.R.S. 2005, it would have taken six months for the

family to get licensed as a North Carolina foster home. Because the family had not met the children and may have lacked full appreciation of their needs, the home study advised against placing the children into their home.

The therapeutic visit supervisor and the children's therapist testified that the children suffered from reactive attachment disorder stemming from their early childhood experience with the parents. With therapy, they had begun to form an attachment with their foster parents, who intended to adopt them if freed for adoption. The children's therapist believed that disruption of the attachment process would be detrimental to the children and recommended that they remain with their foster family and become available for adoption.

Based on this evidence, the trial court rejected a permanent placement with the family in North Carolina, finding as follows:

> The proposed custodians, although very decent, educated and well-meaning people, will not qualify for guardianship under the laws of North Carolina for six months. They are strangers to these children. This Court sees no benefit to the children in removing them from a stable, [foster-adoptive] home where they are doing well into a home with strangers. This will not serve their best interests. Additionally, these children need the permanency that only adoption can provide.

We conclude the trial court's findings rejecting permanent placement with the North Carolina family are supported by the record, and they may not be disturbed on review. *See People in Interest of D.B-J., supra.*

Judgment affirmed.

JUDGE VOGT and JUDGE LOEB concur.

## APPENDIX B

COLORADO COURT OF APPEALS

Court of Appeals No. 05CA0731
Adams County District Court, No. 03JV762
Honorable Chris Melonakis, Judge

The People of the State of Colorado,

Petitioner-Appellee,

In the Interest of T.D., Jr., and S.D., Children,

and Concerning M.A. and T.D.,

Respondents-Appellants.

JUDGMENT AFFIRMED

Division II
Opinion by: JUDGE ROTHENBERG
Vogt and Loeb, JJ., concur

Opinion Modified, and As Modified,
Petitions for Rehearing DENIED

Announced: March 9, 2006

James D. Robinson, Adams County Attorney, Deborah Kershner, Assistant County Attorney, for Petitioner-Appellee,

Gibson, Dunn, & Crutcher, LLP, J. Gregory Whitehair, Jonathan M. Warner, Monica K. Loseman, Denver, Colorado; John R. Chesteen, Westminster, Colorado, for Respondent-Appellant M.A.

Bruce E. Kirkpatrick, Henderson, Colorado, for Respondent-Appellant T.D.

**OPINION previously issued has been substantially rewritten.**

**Modified opinion is attached.**

In this consolidated appeal, M.A. (mother) and T.D. (father) appeal from a judgment terminating their parent-child legal relationships with their children, T.D., Jr. and S.D. We affirm.

## I. Background

In early 2004, the parents' two children were removed from the home by the Adams County Department of Social Services because of concerns about its unsafe physical condition. A dependency and neglect petition was filed, an adjudication order was entered, and the children were placed in a foster home.

During their visitations, the parents noticed bruising on the children and reported it to the department. They claim their concerns were ignored or minimized. Shortly thereafter, T.D., Jr. suffered a traumatic head injury while in foster care, which required that he be hospitalized for about a month and resulted in permanent injury. The parents testified that this event caused them considerable anguish and that, thereafter, they both had difficulty cooperating with the department in implementing their treatment plans. On behalf of T.D., Jr. they retained counsel, who filed a lawsuit against the department and certain of its employees.

The parents had separate trial counsel, and they have separate appellate counsel, who did not serve as trial counsel during the termination proceedings.

The parents' appeal was filed after the effective date of C.A.R. 3.4, which was adopted by the Colorado Supreme Court. The rule expedites appeals in dependency and neglect proceedings and makes significant changes in the way such appeals proceed in this court.

In her petition on appeal, mother challenged the constitutionality of the new rule as applied to her. She raised several issues, and we requested supplemental briefs addressing them. We later requested additional briefs from all parties addressing whether there was a conflict of interest between the department and the parents in this case, and if so, the appropriate remedy.

## II. Constitutional Issues

Mother contends that by expediting dependency and neglect appeals, C.A.R. 3.4 interferes with her right of access to the judicial process, and violates her rights under the Due Process and Equal Protection Clauses of the federal and state constitutions. She maintains that C.A.R. 3.4 deprives her of fundamentally fair appellate review by (1) failing to provide an opportunity for full briefing in all dependency and neglect appeals; (2) requiring the court, rather than the appellant, to decide which issues require written argument; and (3) forcing appellant's counsel to rely "on an incomplete record, including an informal transcript," and therefore depriving the appellant of the effective assistance of appellate counsel. We reject each of her arguments in turn.

### A. Court of Appeals Jurisdiction

We have found no published cases in Colorado directly resolving whether we have jurisdiction to address the constitutionality of a rule promulgated by the Colorado Supreme Court, and other states are divided on the manner in which

the constitutionality of a state supreme court rule may be challenged. Although none of the parties have raised this issue, we conclude it is appropriate first to address our jurisdiction. *See Davidson Chevrolet, Inc. v. City & County of Denver*, 138 Colo. 171, 174, 330 P.2d 1116, 1118 (1958) ("Every court has judicial power to hear and decide the question of its own jurisdiction.").

Appellate courts in Florida and Tennessee have upheld the authority of the trial court or intermediate court of appeals to construe supreme court rules when applying them to given cases, but have concluded this authority does not extend to nullification of the rules. *See Ser-Nestler, Inc. v. Gen. Fin. Loan Co.*, 167 So. 2d 230, 232 (Fla. Dist. Ct. App. 1964) ("The Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the source of authority, they remain inviolate."); *Barger v. Brock*, 535 S.W.2d 337, 342 (Tenn. 1976) ("[T]he inferior courts of the state may not entertain any suit or action challenging the validity of any Rule of this Court. Such a suit would be in the nature of a bill of review or to impeach a judgment of this Court . . . .").

Other states, including Arizona, North Carolina, Ohio, and Texas, have allowed the constitutionality of a supreme court rule to be challenged in a litigated case. For example, the Texas Supreme Court upheld the jurisdiction of the state's lower courts to decide, in the first instance, the constitutionality of its rules, provided there is a real case or controversy before the court:

> Because the Court's power to regulate the practice of law is an administrative one, the exercise of that power does not in and of itself deprive lower courts of general subject matter jurisdiction over challenges to that governance. They do not, however, have jurisdiction over <u>all</u> such challenges because in every in-

> dividual case, jurisdiction also depends on justiciability. . . . [T]here must be a real controversy between the parties that will be actually resolved by the judicial relief sought.
>
> . . . .
>
> . . . Had this Court actually promulgated rules establishing a pro bono program and had Gomez challenged the constitutionality of such rules, the district court would have jurisdiction to decide, in the first instance, whether such rules met constitutional standards. In due course, we would review any adverse determination in our adjudicative capacity. . . . Such a case would be justiciable because the district court would be capable of rendering a judgment that accords the parties complete relief, subject of course to appellate review.

*State Bar v. Gomez*, 891 S.W.2d 243, 245-46 (Tex. 1994) (citations omitted); *see also Chenault v. Phillips*, 914 S.W.2d 140, 142 (Tex. 1996) ("[C]onstitutional challenges to rules enacted by this Court must be brought in the district court and heard by this Court in the exercise of its appellate jurisdiction."). *But see Sherman v. State*, 12 S.W.3d 489, 494 (Tex. App. 1999) (refusing to address challenge to the constitutionality of a rule promulgated by the Texas Court of Criminal Appeals, the state's court of last resort for criminal appeals, stating: "As an intermediate appellate court, we are not the appropriate forum to do so.").

In *State v. Meek*, 8 Ariz. App. 261, 445 P.2d 463 (1968), a majority of the Arizona Court of Appeals held that, as an intermediate appellate court, it lacked jurisdiction to determine the validity of rules promulgated by the Arizona Supreme Court. However, the Arizona Supreme Court, on a petition for review, remanded the case to the court of appeals "with directions to determine [the] case on [its] merits."

*State v. Meek*, 9 Ariz. App. 149, 151, 450 P.2d 115, 117 (1969).

On remand, the court of appeals stated:

> This indicates to us that the Arizona Supreme Court is in accord with the statements as to this Court's position announced in the dissent of our previous opinion in *State v. Meek*. We now hold that the Arizona Court of Appeals has the power to determine the validity and constitutionality of the rules promulgated by the Arizona Supreme Court in connection with a case before us.

*State v. Meek*, *supra*, 9 Ariz. App. at 151, 450 P.2d at 117.

Similarly, in *Beard. v. North Carolina State Bar*, 320 N.C. 126, 128, 357 S.E.2d 694, 695 (1987), an attorney filed an action in the trial court when his license to practice law was suspended because he refused to pay into the Client Security Fund, as required by an order of the North Carolina Supreme Court. The supreme court stated that "a direct challenge of the constitutionality of an order of this Court" "must be litigated as an original action in the General Court of Justice." *Beard v. N.C. State Bar*, *supra*, 320 N.C. at 128, 357 S.E.2d at 695.

In an Ohio case, the court of appeals simply considered the constitutionality of a supreme court rule without questioning whether it had authority to do so. *See Shimko v. Lobe*, 152 Ohio App. 3d 742, 751, 790 N.E.2d 335, 342 (2003) (court of appeals upheld constitutionality of court rule, noting that its decision was "in accord with courts in other jurisdictions which have encountered similar constitutional challenges to court rules that require attorney fee arbitration"), *aff'd*, 103 Ohio St. 3d 59, 813 N.E.2d 669 (2004).

Some state supreme courts have expressly provided for the filing of petitions challenging their orders and rules di-

rectly with that court. *See Aldridge v. Watling Ladder Co.*, 275 Ark. 225, 226, 628 S.W.2d 322, 323 (1982) (holding that a case involving construction of supreme court rule should have been certified to supreme court under Supreme Court Rule 29(1)(c)); *Goetz v. Harrison*, 153 Mont. 403, 404, 457 P.2d 911, 912 (1969) (questions involving the constitutionality of a supreme court rule should "perhaps" be presented to the supreme court in an "appropriate original proceeding" or in the federal district court). Currently, Colorado has no such provision.

The Colorado Court of Appeals is a statutorily created court. Section 13-4-102(1)(b), C.R.S. 2005, provides, as relevant here, that "the court of appeals shall have initial jurisdiction over appeals from final judgments of the district courts, the probate court of the city and county of Denver, and the juvenile court of the city and county of Denver, except in . . . [c]ases in which a statute, a municipal charter provision, or an ordinance has been declared unconstitutional." The statute does not otherwise limit this court's authority to address constitutional issues.

*Yeager v. Quinn*, 767 P.2d 766 (Colo. App. 1988), also offers some guidance. There, judges in Boulder, County Court filed a declaratory judgment action in the district court regarding the validity of a directive issued by the Chief Justice of the Colorado Supreme Court, which provided for the replacement of county court reporters by electronic audio recording devices. The trial court entered summary judgment denying them preliminary injunctive relief and dismissed their complaint.

The county court judges appealed and a division of this court affirmed the district court, concluding the directive was a valid exercise of executive authority by the Chief Justice. There was no suggestion that the court of appeals lacked jurisdiction to address the validity of a Chief Justice Directive.

Later, in *Office of State Court Administrator v. Background Information Services, Inc.*, 994 P.2d 420, 431 (Colo. 1999) (quoting *Bye v. Dist. Court*, 701 P.2d 56, 59 (Colo. 1985)), the Colorado Supreme Court rejected the contention that a Chief Justice Directive was of no effect because it was not an order or rule of the court, stating: "Chief Justice Directives . . . are policy statements promulgated pursuant to this court's general power to administer the Colorado judicial system." The supreme court cited *Yeager v. Quinn*, *supra*, with approval.

If the court of appeals has jurisdiction to address the authority of a Chief Justice Directive, which is tantamount to a court order or rule, *see Office of State Court Adm'r v. Background Info. Servs., Inc.*, *supra*, it seems reasonable to conclude the court of appeals has jurisdiction to address the constitutionality of a supreme court rule. *Cf. People v. Drum*, 194 Ill. 2d 485, 73 N.E.2d 44 (2000) (the interpretation of a supreme court rule is treated like interpretation of a statute, i.e., as a question of law that is reviewed de novo); *People v. Phillips*, 468 Mich. 583, 663 N.W.2d 463 (2003) (same).

Also, unlike cases involving attorney discipline, which are exclusively within the authority of the Colorado Supreme Court, *see Colo. Supreme Court Grievance Comm. v. Dist. Court*, 850 P.2d 150 (Colo. 1993), the issues we address in this appeal impact only one court in Colorado -- this court -- and it is highly unlikely that a challenge to the rule would or could be raised in any forum other than this court or the Colorado Supreme Court. Indeed, a challenge to the constitutionality of C.A.R. 3.4 would be premature until a party in a dependency and neglect case has filed a notice of appeal in the court of appeals, and the supreme court is under no obligation to grant certiorari or to invoke its original jurisdiction to issue an extraordinary writ. Thus, our refusal to address this constitutional issue may mean that appellants, such as mother here, have no forum for their arguments.

Because our supreme court has not spoken to the jurisdictional issue, and for the other reasons set forth above, we therefore conclude we have jurisdiction to address mother's challenge to the constitutionality of the rule.

B. Due Process

When the state seeks to terminate the relationship between a parent and child, it must comply with the Due Process Clause, which requires a fundamentally fair procedure. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *B.B. v. People*, 785 P.2d 132 (Colo. 1990); *People in Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982).

For procedural due process purposes, fairness is assessed by application of the three-factor test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), which requires consideration of three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See C.S. v. People in Interest of I.S.*, 83 P.3d 627 (Colo. 2004); *People in Interest of A.M.D., supra.*

In *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996), the Supreme Court concluded Mississippi's requirement that an indigent mother pay for a transcript before she could appeal a decree terminating her parental rights violated her rights to due process and equal protection. The Supreme Court noted that "[d]ue process and equal protection principles converge" in cases concerning access to judicial processes, and that "[t]he due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action." *M.L.B. v. S.L.J., supra*, 519

U.S. at 120, 117 S.Ct. at 566 (quoting *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2068-69, 76 L.Ed.2d 221 (1983)).

Although the Court in *M.L.B.* did not address *Mathews v. Eldridge*, *supra*, it nonetheless applied the Mathews three-pronged approach by identifying the private interest affected (the forced termination of mother's parental rights) and the governmental interest (the legitimate interest in offsetting the costs of its court system). The Court equated the appeal of a termination of parental rights case to the appeal of a petty offense, and relying on *Mayer v. City of Chicago*, 404 U.S. 189, 198, 92 S.Ct. 410, 416, 30 L.Ed.2d 372 (1971), held that "Mississippi may not withhold from M.L.B. 'a record of sufficient completeness' to permit proper [appellate] consideration of [her] claims." *M.L.B. v. S.L.J.*, *supra*, 519 U.S. at 128, 117 S.Ct. at 570.

In this case, it is undisputed that parents have a fundamental liberty interest in the care, custody, and management of their children, *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *B.B. v. People*, *supra*; *People in Interest of A.M.D.*, *supra*; and both parents and children have an important interest in a continuing family relationship. *See People in Interest of C.A.K.*, 652 P.2d 603 (Colo. 1982); *People in Interest of A.M.D.*, *supra*.

However, the state also has a significant interest in finalizing a dependency and neglect proceeding in an expeditious manner to meet the child's emotional and psychological needs for a permanent home. *See* § 19-1-102(1.6), C.R.S. 2005.

We conclude that the private interests of a parent who is affected by an appellate proceeding, while extremely important, do not outweigh the state's interests in protecting the safety and other needs of children in dependency and neglect cases. Therefore, in order to resolve the due process issue, we consider the risk of an erroneous deprivation of mother's

appellate rights and the probable value, if any, of additional or substitute procedural safeguards. *See Mathews v. Eldridge, supra.*

There is no constitutional right to appeal, *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), but once a state has created such a statutory right, the procedures afforded to secure that right must comport with due process and equal protection. *M.L.B. v. S.L.J., supra*; *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."); *People v. Rivera-Bottzeck*, 119 P.3d 546 (Colo. App. 2004).

Colorado has created a statutory right to appeal in dependency and neglect proceedings. Section 19-1-109(1)-(2), C.R.S. 2005.

The Colorado Supreme Court adopted C.A.R. 3.4 in response to the federal and state law shift in focus from family reunification to "time-limited family reunification services." *See* 42 U.S.C. §§ 629a(7), 675(5) (2000); §§ 19-1-102(1.6), 19-1-109(3), 19-1-115(7), 19-1-123, 19-3-100.5, 19-3-604(2)(k), 19-3-702, 19-3-703, C.R.S. 2005. Section 19-1-109(3) created a "Child Welfare Appeals Workgroup" to submit a written report to the General Assembly to consider necessary statutory or other changes. The goal of the legislature was to ensure that appeals in dependency and neglect cases be completed within six months after being filed. *See People in Interest of A.J.H.*, ___ P.3d ___ (Colo. App. No. 05CA1129, Feb. 23, 2006).

Retired court of appeals judge, Karen S. Metzger, and Judge Karen M. Ashby, Chief Judge of the Denver Juvenile Court, are the co-chairs of the Court Improvement Committee, a proponent of the rule. Both of them appeared at a pub-

lic hearing before the Colorado Supreme Court on January 25, 2005, concerning the proposed rule and explained that it is modeled on a rule adopted in Iowa. *See In re C.M.*, 652 N.W.2d 204 (Iowa 2002) (applying similar Iowa appellate rule); *In re R.K.*, 649 N.W.2d 18 (Iowa Ct. App. 2002) (same).

Judge Metzger stated that, based on case studies, approximately 100 dependency and neglect cases per year were filed in the court of appeals, and that it then took one year from the filing of the notice of appeal until the mandate issued. Judge Metzger further stated: "The proposed rule 3.4 does not change the substantive, qualitative analysis for these kinds of appeals. Instead, it's the belief of the Court Improvement Committee . . . that it does what federal and state law mandates us to do, quite candidly, move cases expeditiously through the system." Tape recording of public hearing before the Colorado Supreme Court (Jan. 25, 2005).

C.A.R. 3.4 requires an appellant to file a petition raising issues for appeal, instead of arguing issues as in a traditional brief. C.A.R. 3.4(g)(3). The petition is due within twenty days of the filing of the notice of appeal, C.A.R. 3.4(g)(1), and the opposing party has twenty days thereafter to file .a response. C.A.R. 3.4(h)(1). The record on appeal, which includes designated transcripts of hearings before the trial court, *see* C.A.R. 3.4(e)(3), must be transmitted to the court of appeals within forty days of the filing of the notice appeal. C.A.R. 3.4(f)(1).

Some, but not all judicial districts in Colorado currently have the technology to prepare transcripts quickly. Hence, in some cases, the new rule's filing requirements may preclude the use of the complete record by appellate counsel in preparation of the petition or response, as occurred here where mother relied on an "informal transcript."

Nevertheless, the rule provides that the parties may request a copy of an unedited transcript from the court reporter,

giving appellate counsel the opportunity to identify the issues for review, to summarize the relevant facts, and to provide supporting legal authority, *see* C.A.R. 3.4(e)(6). While that opportunity admittedly depends on the quality of the unedited transcript, the rule does not prevent counsel from requesting leave to supplement the petition or response, if an examination of the completed record convinces Counsel that manifest injustice would otherwise result. C.A.R. 3.4(i) also allows appellate counsel to request oral argument, and C.A.R. 3.4(k)(1) provides for a petition for rehearing.

After the required documents are filed, the court of appeals -- acting through one of its three judge-divisions -- then reviews the petition on appeal, any responses to the petition, and the trial court record. The assigned division, which has access to the completed record, is responsible for verifying appellate counsel's statement of facts and application of the law to the facts.

The division may affirm, reverse, or vacate the trial court's decision, remand the case to the trial court, or request supplemental briefing by the parties addressing issues raised by them or noticed by the division itself. C.A.R. 3.4(j)(2). Although the authority to request supplemental briefing is explicit in the new rule, it is not a new practice. Divisions of this court have requested counsel to address issues noticed by the division in numerous civil, criminal, and administrative cases. *See, e.g., People v. Krutsinger*, 121 P.3d 318 (Colo. App. 2005); *People v. Turley*, 109 P.3d .1025 (Colo. App. 2004); *Roberts v. Am. Family Mut. Ins. Co.*, 113 P.3d 164 (Colo. App. 2004) (*cert. granted* May 2, 2005).

The rule requires that the proceedings be advanced on the court of appeals' calendar. C.A.R. 3.4(j)(1). Thus, the division must promptly affirm the order of termination and free the child for adoption, or reverse the order and allow the reunification of the child and parents. This expedited procedure benefits the parents by quickly correcting decisions in

which their rights were terminated erroneously. The expedited procedure also benefits children, whose parents have had their rights terminated by the trial court, by decreasing the time they are in "legal limbo" and either returning them to their parents or permitting legal adoption. *See In re C.M., supra*; *In re R.K., supra*. Accordingly, the latter benefit furthers the state's interest in protecting children.

Apart from her challenge to the quality and the timeliness of the informal transcripts, mother also contends the rule violates due process because it improperly requires an appellant to make a preliminary showing that the appeal is meritorious. Alternatively, she maintains that the rule forces the members of the division to prejudge the appeal in deciding when to order supplemental briefs. We disagree.

A considerable number of the appeals from termination cases challenge the sufficiency of the evidence, the adequacy of the treatment plan, and the existence of less drastic alternatives to termination. These challenges are to the factual, not the legal, determinations made by the trial court, and they require the division to examine the record for any support of the trial court's findings. Under the new rule, the division can do so because it has the entire record before issuing a decision.

Relatively few appeals raise purely legal issues or complex factual issues that cannot be resolved by established precedent. The issues raised in such cases require a more thorough analysis by counsel and the division. The rule allows the division to order supplemental briefing in such cases, indeed, in all cases, and thus provides the parties such an opportunity.

Thus, the expedited process does not alter the division's responsibility to examine thoroughly the record on factual issues, and contrary to mother's contention, it does not place the division in the role of an advocate on legal issues.

We acknowledge that the new rule is not perfect. *See In Interest of N.A.T.*, ___ P.3d ___ (Colo. App. No. 05CA1512, Mar. 9, 2006) (Román, J., dissenting). However, in assessing the risk of erroneous deprivation the new rule may cause, we bear in mind that parents in a termination case have already been afforded the full panoply of due process rights in the trial court.

Our job is not to second-guess the factual decisions of the trial court or interfere with the exercise of its discretion. The duty of an appellate court is to review the record for legal error and to correct such error if it affected the fairness and outcome of the proceedings. *See* C.R.C.P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). The new rule does not prevent us from performing this duty.

In summary, we reject mother's contention that the accuracy of the transcript initially available to her, the timeliness of the complete transcript, and the expedited process in which the assigned division reviews the appeal and reaches its decision, violate her right to procedural due process. We conclude that she was provided with a record of sufficient completeness to permit proper consideration of her claims on appeal, *M.L.B. v. S.L.J.*, *supra*, 519 U. S. at 128, 117 S.Ct. at 570, and that the new rule sufficiently protects parents in dependency and neglect cases against the risk of an erroneous deprivation of their appellate rights (1) by allowing appellate counsel for the parents a reasonable opportunity to review an unedited transcript and to raise possible issues for appeal, and (2) by allowing the assigned division of the court of appeals to review the complete record and order supplemental briefing when appropriate. *See Mathews v. Eldridge*, *supra*; *In re R.K.*, *supra* (concluding Iowa's expedited appellate procedure in termination appeals does not violate a parent's right to due process); *see also United States v. Marines*, 535 F.2d

552 (10th Cir. 1976) (concluding court's summary calendar, which permits more limited briefing, does not violate due process as long as defendant is able properly to present issues on appeal); *People v. Rivera-Bottzeck*, *supra* (concluding that limiting the length of a defendant's brief on appeal did not violate his right to due process where he was not forced to abandon any issues).

In reaching our conclusion that mother's constitutional right to due process was not violated by the expedited procedure required under C.A.R. 3.4, we also observe that there are several ways in which trial courts can alleviate the problems raised by counsel in this appeal and assist this court in performing its function.

For example, the trial court can (1) identify in its findings and written order any difficult or novel legal issues that arose during the proceedings; (2) require that before trial counsel is permitted to withdraw and be replaced by a different appellate counsel, trial counsel file a written statement identifying any difficult or novel legal issues that arose during the proceedings; and (3) require that trial counsel personally confer with appellate counsel shortly after filing the notice of appeal to assist in identifying issues on appeal.

The trial court can also alleviate appellate delay by reducing its oral findings and conclusions to writing immediately. Counsel cannot file a notice of appeal until there is a final judgment, which requires a written and signed order by the trial court. *See* C.R.C.P. 58(a). Further, the trial court can ensure that there is no delay by the clerk's office in assigning a court reporter to prepare the record.

C. Equal Protection

Mother also contends C.A.R. 3.4 violates her constitutional right to equal protection under U.S. Const. amend. XIV and Colo. Const. art. II, § 25, because parents whose rights are terminated under article 5 of the Colorado Chil-

dren's Code, *see* §§ 19-5-105, 19-5-203, C.R.S. 2005, are not subject to the expedited appellate procedure set forth in the rule, nor are those parents whose custodial rights are affected in other civil actions. We conclude those parents are not similarly situated and therefore reject mother's argument.

Equal protection of the law requires that the government treat similarly situated persons in a similar manner. A distinction between classes or groups of people, whether created by a statute or rule, must have some relevance to the purpose for which the classification is made. When governmental action is subjected to an equal protection challenge, the level of judicial scrutiny varies with the type of classification employed and the nature of the right affected. *Tassian v. People*, 731 P.2d 672, 574 (Colo. 1987).

To state an equal protection violation, a person must establish that he or she received treatment different from that afforded to similarly situated persons. *People v. Oglethorpe*, 87 P.3d 129 (Colo. App. 2003). Thus, the threshold question in any equal protection challenge is whether the persons allegedly subject to disparate treatment are in fact similarly situated. If they are not, the equal protection challenge must fail. *See People v. Watkins*, 126 P.3d 309 (Colo. App. 2005).

The overriding purpose of the Children's Code is to protect the welfare and safety of children by providing a procedure through which their best interests can be served. *L.G. v. People*, 890 P.2d 647 (Colo. 1995).

The distinction created by C.A.R. 3.4 is between parents subject to dependency and neglect proceedings under article 3 of the Colorado Children's Code and parents subject to relinquishment and adoption proceedings under article 5 of the Code or other civil proceedings that may affect their parental rights.

However, dependency and neglect proceedings focus primarily on the protection and safety of children susceptible

to harm from the effects of abuse and neglect, not on the custodial interests of the parent. *L.G. v. People*, *supra*; *People in Interest of C.M.*, 116 P.3d 1278 (Colo. App. 2005). In such proceedings, an order affecting a parent's custodial rights may not be made until after the children have been adjudicated, which requires a determination that the children's custodial circumstances or other aspects of their environment are detrimental to them and must be altered. *L.A.G. v. People in Interest of A.A.G.*, 912 P.2d 1385 (Colo. 1996); *People in Interest of C.M.*, *supra*.

Further, a proceeding in dependency and neglect may only be initiated by the state, *L.A.G. v. People in Interest of A.A.G.*, *supra*; *L.G. v People*, *supra*, which has a compelling interest in the speedy, permanent disposition of a child who has been adjudicated dependent and neglected. *See* §§ 19-1-102(1.6), 19-1-109(3), 19-1-115(7), 19-1-123, 19-3-100.5, 19-3-604(2)(k), 19-3-702, 19-3-703; *People in Interest of E.I.C.*, 958 P.2d 511 (Colo. App. 1998).

Although stepparent adoptions and relinquishment proceedings may result in the involuntary termination of a parent's rights, *see* §§ 19-5-105(3.1), 19-5-203(1)(j)-(k), C.R.S. 2005, they are not initiated by the state, and the state is not a party to the proceedings. Nor is the state a party to other civil proceedings, such as dissolution of marriage or grandparent visitation proceedings under the Uniform Dissolution of Marriage Act (UDMA), § 14-10-101, et seq., C.R.S. 2005, in which a parent's custodial rights might be affected. Further, proceedings under article 5 of the Code or under the UDMA generally do not involve a situation where the child is exposed to an injurious environment. *See* § 19-5-100.2, C.R.S. 2005; *L.A.G. v. People in Interest of A.A.G.*, *supra*.

We therefore conclude that parents, such as mother, whose rights are involuntarily terminated in a dependency and neglect proceeding pursuant to article 3 of the Children's Code, are not similarly situated with parents whose rights are

terminated under article 5 of the Code. *See* §§ 19-5-105, 19-5-203, C.R.S. 2005. Thus, mother has not established the threshold requirement for an equal protection challenge.

D. Effective Assistance of Counsel

Mother next contends C.A.R. 3.4 violates the federal and state constitutional right to effective assistance of counsel because the lack of a complete record prevents appellate counsel from adequately developing and presenting the issues on appeal. We are not persuaded.

Once counsel is appointed, a parent is entitled to effective assistance, *S.S. v. Wakefield*, 764 P.2d 70 (Colo. 1988), and the standards used to assess effective assistance in a criminal case apply. *People in Interest of V.M.R.*, 768 P.2d 1268 (Colo. App. 1989).

To establish a claim of ineffective assistance of counsel, a parent must show that counsel's performance fell below the level of reasonably competent assistance and that counsel's deficient performance was so prejudicial as to deprive the parent of a fair hearing. *People in Interest of V.M.R., supra.*

As discussed, C.A.R. 3.4 provides access to an unedited transcript for preparation of the petition on appeal and an opportunity to identify the issues on appeal. Verification of counsel's statement of facts is undertaken by the assigned division of the court of appeals, after the complete transcript has been filed. The division must apply the appropriate legal authority cited by counsel to the verified facts in deciding the issues raised in the petition. The division may also undertake its own supplemental research, and order further briefing on any issues.

Here, there has been no showing that the unavailability of the complete record under C.A.R. 3.4 resulted in a deficient performance by appellate counsel. *See People In interest of N.A.T., supra*; *In re L.M.*, 654 N.W.2d 502 (Iowa 2002) (holding that under the similar Iowa rule, the shortened time

for filing a petition on appeal, which precludes review of the transcript, does not give rise to a per se claim of ineffective assistance of counsel). In our view, all appellate counsel have done an excellent job of identifying and addressing the issues in this appeal.

III. Withdrawal of Mother's Counsel

Mother next contends the trial court erred in allowing her court-appointed trial counsel to withdraw. We disagree.

A parent has a statutory, not a constitutional, right to appointed counsel in a dependency and neglect proceeding, §§ 19-1-105(2), 19-3-202(1), 19-3-602(2), C.R.S. 2005; *C.S. v. People in Interest of I.S.*, *supra*, and it must be invoked by the parent's timely request for appointed counsel. *People in Interest of L.L.*, 715 P.2d 334 (Colo. 1986); *People in Interest of L.A.C.*, 97 P.3d 363 (Colo. App. 2004); *People in Interest of V.W.*, 958 P.2d 1132 (Colo. App. 1998).

Here, counsel was appointed to represent mother shortly after the petition in dependency and neglect was filed. Six months later, she asked her counsel to withdraw. She informed the court that she was dissatisfied with counsel's performance and that she intended to hire private counsel. The court found there was a conflict between mother and counsel and allowed counsel to withdraw. Mother proceeded pro se for over two months, despite the trial court's repeated suggestions that new counsel be appointed. When the department of social services expressed its intention to pursue termination, the trial court advised mother that it was perilous to proceed without counsel, and she then requested and received another appointed counsel.

We therefore perceive no error in the trial court's order allowing counsel to withdraw, and we reject mother's contention that her statutory right to court-appointed counsel was violated.

## IV. Insufficiency of Motion to Terminate

We also reject mother's argument that the motion to terminate her parental rights was insufficient because it failed to specify the factual grounds for termination. A motion to terminate is sufficient so long as it is couched in the statutory language set forth in § 19-3-604(1), C.R.S. 2005, as it was here. *See People in Interest of C.A.J.*, 709 P.2d 604 (Colo. App. 1985); *People in Interest of M.H.*, 683 P.2d 807 (Colo. App. 1984).

## V. Sufficiency of the Evidence

Both parents contend the evidence was insufficient to support the criteria for termination. We disagree.

To terminate the parent-child legal relationship pursuant to § 19-3-604(1)(c), C.R.S. 2005, clear and convincing evidence must establish that the child has been adjudicated dependent or neglected; that an appropriate treatment plan, approved by the trial court, has not been complied with by the parent or has not been successful in rehabilitating the parent; that the parent is unfit; and that the parent's conduct or condition is unlikely to change within a reasonable time. *People in Interest of A.M.D., supra.*

When appropriate, the department must make reasonable efforts to reunify the family. Section 19-3-100.5(1); *see* § 19-3- 604(2)(h), (k)(III), C.R.S. 2005. "Reasonable efforts" means the exercise of diligence and care for children who are placed out of the home; but the primary considerations in a termination proceeding are the physical, mental, and emotional conditions and needs of the children. Section 19-3-604(3), C.R.S. 2005; *People in Interest of D.B-J.*, 89 P.3d 530 (Colo. App. 2004) § 19-3-604(3), C.R.S. 2005.

The reasonable efforts standard is met if services are provided in accordance with § 19-3-208, C.R.S. 2005. *See* § 19-3-100.5(4), C.R.S. 2005. Among the efforts required of the department are an assessment of the family, development

of a case plan for the provision of services, and visitation services. Section 19-3-208.

A. Adequacy of the Treatment Plan

The parents contend the trial court erred in finding the treatment plan was appropriate. We disagree.

A treatment plan is appropriate if it "is reasonably calculated to render the particular [parent] fit to provide adequate parenting to the child within a reasonable time" and "relates to the child's needs." Section 19-1-103(10), C.R.S. 2005.

The purpose of a treatment plan is to preserve the parent-child relationship by assisting the parent in overcoming the problems that led to the dependency adjudication. Its appropriateness is measured by the likelihood of success in reuniting the family, which must be assessed in light of the facts existing at the time of its approval. *People in Interest of M.M.*, 726 P.2d 1108 (Colo. App. 1986).

Absolute compliance with a treatment plan is not required. *See People in Interest of C.L.I.*, 710 P.2d 1183 (Colo. App. 1985). On the other hand, partial or even substantial compliance with a plan may still not result in success if it does not correct or improve the parent's conduct or condition. *See People in Interest of C.A.K., supra*; *People in Interest of D.L.C.*, 70 P.3d 584 (Colo. App. 2003).

Where, as here, the proceedings concern a child under the age of six, § 19-3-604(1)(c)(I)(B), C.R.S. 2005, provides that the treatment plan is not successful if:

> [t]he parent exhibits the same problems addressed in the treatment plan without adequate improvement, including but not limited to improvement in the relationship with the child, and is unable or unwilling to provide nurturing and safe parenting sufficiently adequate to

meet the child's physical, emotional, and mental health needs and conditions.

In making its findings, the trial court must consider the totality of the evidence, *People in Interest of J.E.B.*, 854 P.2d 1372 (Colo. App. 1993), and it should attribute more .weight to the most recent reports and evaluations. *People in Interest of L.D.*, 671 P.2d 940 (Colo. 1983); *People in Interest of V.W., supra.*

The credibility of the witnesses and the sufficiency, probative effect, and weight of the evidence, as well as the inferences and conclusions to be drawn from it, are within the discretion of the trial court. A trial court's findings and conclusions will not be disturbed on review if the record supports them. *People in Interest of C.A.K., supra.*

In this case, the court approved a treatment plan requiring that the parents (1) complete hair follicle tests to detect drug use and undergo substance abuse evaluations if the tests were positive; (2) attend supervised visits with the children; (3) maintain employment; (4) participate in domestic violence evaluations and follow any recommendations; and (5) participate in psychological evaluations. The treatment plan thus attempted to address the problems that required the initial intervention and related to the children's need for a safe home.

1. Father's Treatment Plan

Father generally asserts that the trial court's findings concerning the criteria for termination were not supported by clear and convincing evidence. We disagree.

Father lacks standing to raise issues concerning termination of mother's rights. *See People in Interest of J.M.B.*, 60 P.3d 790 (Colo. App. 2002). Thus, we address his contentions only insofar as they concern the termination of his own parental rights.

Father's treatment plan was identical to mother's, which was designed to address the family's problems. However, his anger toward the department, while understandable, remained so intense and unabated as to completely interfere with his compliance with the plan. He shaved his head and body to delay the hair follicle test, refused to participate in domestic violence counseling, and did not follow through with mental health treatment as recommended by his psychological evaluation.

At the time of the termination hearing, he had not completed a single therapeutic component of the treatment plan, and he exhibited the same problems as those initially addressed by the treatment plan. The court thus found, with record support, that he was unable or unwilling to provide nurturing and safe parenting to the children. *See* § 19-3-604(1)(c)(I)(B), C.R.S. 2005. Pointing to father's history of violence, his repeated threats of harm to the social worker, and his failure to make any progress, the court found that he was unfit and that his conduct or condition was unlikely to change within a reasonable time.

We conclude the evidence was sufficient to support the trial court's findings as to father, and they may not be disturbed on review. *See People in Interest of C.A.K., supra.*

2. Mother's Treatment Plan

Mother's situation was considerably different from that of father. Although she initially was uncooperative and did not begin to comply consistently until six months after the treatment plan had been approved by the trial court, she then began to make considerable progress. By the time of the termination hearing, the court found that "she [had] substantially complied with many components of the treatment plan for the last seven months." She had separated from father and was living in a shelter, but she was also pregnant with a third child by father.

The trial court found that while the separation was indicative of improvement, mother still maintained frequent contact with father, who had not addressed the domestic violence issues. Because of this, the court was concerned that the separation was not permanent and that the addition of a third child would frustrate mother's ability to meet the children's needs. After reviewing all of the evidence and making extensive findings, the trial court stated that "[i]t was with a tremendous sense of sadness . . . that it must find [the department] has met its burden."

While reasonable persons may have reached a different conclusion, we conclude there is record support for the trial court's finding that mother did not successfully comply with the treatment plan and that termination was warranted. Therefore, those findings may not be disturbed on review. *See People in Interest of C.A.K., supra.*

In reaching our conclusion, we reject mother's assertion that the separation of the children from her was not in their best interests and that the treatment plan did not relate to the children's needs. The order placing the children out of the home was separate from the treatment plan, which addressed the problems that required intervention into the family and related to the children's need for a safe home, free from substance abuse and domestic violence. Further, mother did not object to the treatment plan.

Accordingly, we reject mother's contention that the treatment plan was inappropriate. *See People in Interest of M.S.*, 129 P.3d 1086 (Colo. App. 2005) (concluding father was precluded from challenging the appropriateness of his treatment plan because he stipulated to it and failed to request modification).

### B. Department's Reasonable Efforts and Conflict of Interest with Parents

The parents also contend the department failed to make reasonable efforts to reunite the family after T.D., Jr. suffered a traumatic head injury while in foster care. They maintain that the department should have been removed from this case because it had a conflict of interest with the parents. We conclude there is record support for the trial court's finding that the department made reasonable efforts to reunite the family after T.D., Jr. suffered the injury. We further conclude the department had a conflict of interest in this case but the fact that the trial court sua sponte did not disqualify the department does not require reversal of the judgment.

The department denies that it had such a conflict. We are not persuaded. It is undisputed that T.D. Jr.'s debilitating and permanent brain injury was sustained early in the proceedings at the foster home selected by the department, and that the parents, in their capacities as T.D. Jr.'s representatives, were suing the department for that injury. The trial court was incensed when it learned the child had suffered injuries while in foster care. At a hearing early in the proceedings, the court found that on February 2, 2004, T.D. Jr. had "suffered catastrophic, non-accidental head trauma resulting in permanent brain damage at the hands of his foster parent," and it ordered a criminal and civil investigation of the foster home. S.D. was moved to another foster home, as was T.D. Jr. when he was released from the hospital.

Further, there was evidence that before this incident occurred, the parents had complained to the social worker assigned to their case about that foster home and had reported seeing bruises on both of the children. The parents maintain that the social worker disregarded their complaints and that their relationship with the department deteriorated significantly after their son was injured. They were very distrustful of the department and livid about their child's injury, and

both parents became uncooperative. Father was openly hostile to the social worker and others in the department.

The court was informed by the parents' counsel that a civil suit had been filed against the department for the physical and emotional harm done to the children while in the abusive foster home. As father asserted in his supplemental brief:

> After the lawsuit was filed, the same professionals remained responsible for [mother] and her children in the dependency and neglect action. It goes against reason to think the parties at issue could ignore their need to defend themselves from liability in the civil action and, at the same time, work diligently toward reunifying [mother] with her children. In fact, the State and its employees had every incentive to try to prove that [mother] was unfit and that her children's problems were attributable to her alleged bad parenting. For this additional reason, [mother] must be able to press her appeal in as full and effective a manner as possible so that this [c]ourt can exercise the oversight function to which M.A. is entitled.

In *People in Interest of J.A.M.*, 907 P.2d 725 (Colo. App. 1995), a division of this court reversed a judgment of the juvenile court terminating a parent-child relationship, concluding that the child's guardian ad litem should have been disqualified from the proceedings. The division reasoned:

> [D]uring the permanency planning hearing, the GAL recommended termination of the parent-child legal relationship, as did the Department, and stated that she had arrived at her position independently. However, the independent judgment of the GAL could have

> been compromised by her employment with the Department.
>
> Furthermore, the conflict of loyalties inherent in the GAL's dual roles as a representative of the child's best interests and as an employee of the Department necessarily casts doubt on the fairness and impartiality of the legal system in the public eye.
>
> For these reasons, we conclude that the juvenile court erred in failing to disqualify the GAL.

*People in Interest of J.A.M.*, *supra*, 907 P.2d at 726 (citations omitted).

Likewise, in *Petition of Department of Social Services to Dispense with Consent to Adoption*, 429 N.E.2d 685 (Mass. 1981), the Massachusetts court disqualified the department of social services from presenting the Commonwealth's cases, where department employees sought to become preadoptive parents. The court explained that the department has "vastly superior resources for investigation and presentation of its case," that "judges place great confidence in the reports of the department," and therefore, that "the department is extraordinarily influential in its capacity to interfere with family relationships between parents and children." *Petition of Dep't of Soc. Servs.*, *supra*, 429 N.E.2d at 688 (quoting *Dep't of Pub. Welfare v. J.K.B.*, 393 N.E.2d 406, 408 (Mass. 1979)); *see also In re S.D.A.*, 612 S.E.2d 362, 365 n.4 (N.C. Ct. App. 2005) (noting that the "North Carolina Division of Social Services Family Services Manual also permits referral to a sister county when a conflict of interest exists").

We agree with the statement of the court in *In re Eduardo*, 782 N.E.2d 551, 553 (Mass. App. Ct. 2003), that "[t]here need be no per se rule that the mere pendency of litigation by a parent against DSS requires disqualification of

DSS as an advocate against that parent in a custody case." As the Massachusetts court observed, "such an inflexible approach is not required to preserve the integrity of the process and could lead to undesirable litigation strategies." *In re Eduardo, supra*, 782 N.E.2d at 553.

However, this case involves much more than "the mere pendency of litigation by a parent," against the department. The parents' lawsuit in this case was filed on behalf of T.D., Jr. and the department's actions seeking to terminate their rights, if successful, would affect their ability to act on his behalf in T.D., Jr.'s lawsuit. We thus conclude there was a conflict of interest between the department and the parents. The department should have moved to withdraw and should have requested that the court appoint the department of social services in another county to proceed. In no event should the same social worker have remained on this case.

The appearance of fairness is just as important as the reality of fairness. As we have observed, there was evidence showing the department made considerable efforts to engage the parents in treatment and to provide the services ordered by the court and required under the treatment plan. But there was also evidence that the department's employees, who oversaw mother's treatment plan, told her to "get over" the issue of T.D., Jr.'s brain injury, were critical of her when she failed to cooperate or participate with the department for five months after he was injured, and made crucial recommendations to the court, including that the parents' visitation be limited. Thus, the parents were justified in questioning the objectivity of the department and the social worker.

While the issue is close, we nevertheless conclude reversal is not warranted for the following reasons. First, when the court learned of the child's injury, it ordered the department to provide all reasonable services requested by the parents to facilitate their treatment plans. Among the services provided were supervised and therapeutic visits, domestic

violence counseling, substance abuse treatment, and psychological treatment for the parents and the children. The court also appointed a special advocate (CASA volunteer) to provide an independent review of the case and to speak on behalf of the best interests of the children. *See* § 19-1¬201, et seq., C.R.S. 2005. Hence, the department was monitored very closely by the trial court.

Mother participated in these services, but unfortunately waited until five months after the child was injured to begin her treatment plan in earnest. *See People in Interest of L.A.C., supra.*

Second, the trial court granted every request made by the parents' counsel. When mother's counsel first informed the court of the conflict, she asked that an independent expert be appointed, and the court stated that it had already done so. Third, while mother's counsel indicated to the court her intent to file a "formal" request of some kind, and father's counsel also raised the issue, neither counsel ever moved to disqualify the department or sought to preclude department employees from testifying at any of the hearings.

Fourth, the trial court's order, issued after the termination hearing, makes it clear that the court primarily relied on the independent expert it had appointed, and did not rely on the social worker. The court also noted that throughout much of the proceedings, the expert and the CASA volunteer had consistently advocated for the parents and they did not uncritically accept the department's recommendations. And fifth, much of the department's evidence regarding the mother's ability to parent the children was corroborated by the testimony of mother's therapist and the children's therapist.

We conclude there is record support for the trial court's finding that the department made reasonable efforts to reunite the family. We further conclude the trial court's failure sua

sponte to disqualify the department based on a conflict of interest does not require reversal.

In reaching our conclusion, we have not overlooked the parents' observation that by affirming the judgment, we are, in effect, removing their ability to act on behalf of the child in his lawsuit against the department and its employees. We assume the child's guardian ad litem will bring this matter to the attention of the juvenile court and request an order clarifying who now has standing to act on behalf of the minor child in that civil action.

VI. Suspension of Visits Without Hearing

Mother also complains that the trial court suspended her visits with the children nine months before the termination hearing without conducting an evidentiary hearing. She asserts that the trial court improperly delegated the decision to resume visitation to the children's therapist and the independent therapeutic visit supervisor.

However, the visits were suspended after a review hearing, and the court considered the recommendations of the children's therapist and the therapeutic visit supervisor. These recommendations were presented to the court by the department and the guardian ad litem. Mother did not object to the procedure followed by the trial court, did not ask that an evidentiary hearing be conducted, and did not object to the trial court's delegation of authority to reinstate visits.

We therefore conclude her arguments were not properly preserved for appeal. *See People in. Interest of V.W., supra*; *see also People in Interest of B.C.*, 122 P.3d 1067 (Colo. App. 2005).

VII. Less Drastic Alternative

Finally, the parents contend the trial court erred in rejecting permanent placement of the children with family friends in North Carolina as a less drastic alternative to termination.

Mother argues that the finding was based on an error concerning North Carolina law and that the trial court could have imposed protective orders to resolve the perceived problems. We disagree.

The court must also consider less drastic alternatives before entering an order of termination. *C.S. v. People in Interest of I.S., supra*; *People in Interest of M.M., supra*. The primary considerations in a termination proceeding are the physical, mental, and emotional conditions and needs of the child. Section 19-3-604(3); *People in Interest of D.B-J., supra*.

Permanent placement is not a viable alternative to termination if the proposed caregiver lacks appreciation of the parent's problems or of the child's conditions or needs. *See People in Interest of D.B-J., supra*. Permanent placement is also foreclosed if the child needs the stability and permanency of adoption. *People in Interest of E.I.C., supra*; *People in Interest of S.T.*, 678 P.2d 1054 (Colo. App. 1983).

According to the home study conducted pursuant to the Interstate Compact on Placement of Children, § 24-60-1801, et seq., C.R.S. 2005, it would have taken six months for the family to get licensed as a North Carolina foster home. Because the family had not met the children and may have lacked full appreciation of their needs, the home study advised against placing the children into their home.

The therapeutic visit supervisor and the children's therapist testified that the children suffered from reactive attachment disorder stemming from their early childhood experience with the parents. With therapy, they had begun to form an attachment with their foster parents, who intended to adopt them if freed for adoption. The children's therapist believed that disruption of the attachment process would be detrimental to the children and recommended that they remain with their foster family and become available for adoption.

Based on this evidence, the trial court rejected a permanent placement with the family in North Carolina, finding as follows:

> The proposed custodians, although very decent, educated and well-meaning, people, will not qualify for guardianship under the laws of North Carolina for six months. They are strangers to these children. This Court sees no benefit to the children in removing them from a stable, [foster-adoptive] home where they are doing well into a home with strangers. This will not serve their best interests. Additionally, these children need the permanency that only adoption can provide.

We conclude the trial court's findings rejecting permanent placement with the North Carolina family are supported by the record, and they may not be disturbed on review. *See People in Interest of D.B-J., supra.*

Judgment affirmed.

JUDGE VOGT and JUDGE LOEB concur.

## APPENDIX C

| SUPREME COURT<br>STATE OF COLORADO<br>TWO EAST 14TH AVENUE<br>DENVER, COLORADO 80203<br><br>CERTIORARI TO THE COURT OF APPEALS, 05CA0731<br>DISTRICT COURT,<br>ADAMS COUNTY, 03JV762 | CASE NO. 06SC308 |
|---|---|
| **Petitioners:**<br>T.D. and M.A.,<br>v.<br>**Respondent:**<br>THE PEOPLE OF THE STATE OF COLORADO.<br>In the Interest of: T.D., JR. and S.D., children. | |
| **ORDER OF COURT** | |

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 26, 2006.

JUSTICE COATS and JUSTICE EID would grant as to the following issue:

Whether the court of appeals correctly found that in light of the Adams County Department of Social Services conflict of interest with the parents, it could and did make reasonable efforts to reunite the family.

Copies mailed via the State's Mail Services Division on 06/26/06. MLK

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Clerk of the Court
Colorado Court of Appeals

## APPENDIX D

| | |
|---|---|
| COURT OF APPEALS, STATE OF COLORADO<br>Court Address:<br>2 E. 14th Avenue<br>Denver, Colorado 80203<br>Appeal from the District Court for Adams County, Colorado<br>Case No. 2003 JV 762<br>The Hon. Chris Melonakis, District Judge<br><br>Members of the Division of the Colorado Court of Appeals: The Hon. Sandra I. Rothenberg (author of March 9, 2006 opinion);<br>The Hon. JoAnn L. Vogt; and<br>The Hon. Alan Loeb | **COURT USE ONLY**<br><br>Case Number: 05CA0731 |
| **THE PEOPLE OF THE STATE OF COLORADO**<br>**In the Interest of:**<br>**T.D. Jr., S.D.**<br>**Minor Children,**<br>**And Concerning:**<br>**M.A., T.D.**<br>**Appellant:** M.A.<br>Attorneys for M.A.<br>Name:<br>*Monica K. Loseman (#34119) | |

| | |
|---|---|
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| **PETITION FOR REHEARING** | |

* * * *

## II. ARGUMENT

### A. Failure to Substitute a Non-Conflicted Agency Deprived M.A. of Her Fourteenth Amendment Right to Due Process.[1]

In a "close call," the Court found that even though the Department had a conflict of interest that should have re-

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[1] This point of confusion over the appropriate standard of review is a prime example of the inadequacy of Colorado Appellate Rule 3.4. M.A. was not allowed to brief these issues and cast the conflict issue in its appropriate light, though she objected to the existence of the conflict on due process grounds. (*See* Petition of Appeal at 10 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982), *In re A.M.D.*, 648 P.2d 625 (Colo. 1982) and *In re E.A.*, 638 P.2d 278 (Colo. 1981).)

sulted in its removal from the proceedings, reversal was not required because there was "record support" for the trial court's decision. *See* Order at 44-46. In so holding, however, the Court ignored a critical factor: M.A.'s Due Process rights under the Fourteenth Amendment. As the Court recognized in its discussion of the other appeal points, "parents have a fundamental liberty interest in its discussion of other appeal points, "parents have a fundamental liberty interest in the care, custody, and management of their children." Op. at 14 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). These rights are "sheltered by the Fourteenth amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). Proceedings associated with termination of parental rights (including hearings leading up to the termination proceedings), therefore, must be sufficient under the Due Process Clause and are subject to the strictest scrutiny. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Lassiter v. Dept. Soc. Serv.*, 452 U.S. 18, 27 (1981) (applying *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

The Court found a conflict below, but forgave it due to the trial court's putative crime. Under strict scrutiny, however, this is insufficient. The concept of fairness under the Due Process Clause also "requires more than the elimination of actual prejudice. . . . The conduct of justice must not only achieve the reality of fairness, [but] it must also 'satisfy the appearance of justice.'" *People v. Rhodus*, 870 P.2d 470, 473 (Colo. 1994) (quoting *People v. Macrander*, 828 P.2d 234, 238 (Colo. 1992) and *In re Murchison*, 349 U.S. 133, 136 (1955)). Given the nearly unprecedented conflict, the Department had the burden of demonstrating that the appropriate relief, substitution of the Department with a non-conflicted agency, was so burdensome as to constitute a "powerful, countervailing interest." *M.L.B.*, 519 U.S. at 118. It did not and cannot meet that burden.

* * * *

## APPENDIX E

**Excerpt from the Transcript of the Final Pre-Trial Conference to the Termination Hearing, dated January 12, 2005**

* * * *

Statement of Anne Vitek, Counsel for M.A.

[Page 7, line 2 through Page 8, line 24]

I have to indicate to the Court there is a large interest conflict here. I need to do that formally, but there is an ongoing civil lawsuit which names the Department and members of the Department, and, quite frankly, the attorney is present in the audience who represents [M.A.] in that lawsuit. I have not spoken with him, and, therefore, I will not try and argue that position until I have all facts in place, but I will say I think there is a large conflict of interest which the Department has never raised, knowing that that lawsuit was ongoing.

And I question the objectivity of the Department in looking at this case in light of what occurred. And I think some leeway has to be given to [M.A.] for the fact that, yes, a case was initiated against – I am not sure – I have a version from my client of what happened originally during the beginning of this case, but also the Department has its own version. But whatever happened, the children, as the Court is aware, was placed in a foster home. One child was seriously injured. And now it is hard to ascertain whether the problems Timothy has comes from that situation that occurred or whether they are related to my client. But it ends up, in my opinion, coming back on her, finding her as the sole respon-

sibility. And I just don't know that -- that people retained by the Adams County Department of Social Services, quite frankly, are being objective in the case.

We still have the same caseworker on the case who, as I understand, is a subject of a lawsuit. That to me raises kind of a red flag in this case. I have retained an independent expert for my client in light of the termination hearing. My client met with that independent expert yesterday for the first time. I have not had an opportunity to talk to the expert. Based on what my client tells me, apparently the initial assessment went well enough. The expert indicated that they would request an interactional evaluation. And I don't know how we get a fair interactional evaluation when my client never gets to see the children. Of course they will be estranged when that interactional occurs.

I think the Department has a vested interest in seeing, as I have said before, that this case moves forward, these kids are adopted out, and parental rights are terminated. That has an impact with regard, I think, to the lawsuit.

* * * *

Supreme Court, U.S.
FILED

No. (1)

06-429 SEP 21 2006

# In the Supreme Court of the United States

OFFICE OF THE CLERK

ROBERT NAFTALY, chairperson of the Michigan State Tax Commission; ROBERT R. LUPI, member of the Michigan State Tax Commission; DOUGLAS B. ROBERTS, member of the Michigan State Tax Commission; DENNIS PLATTE, executive secretary of the Michigan State Tax Commission,

*Petitioners,*

v.

KEWEENAW BAY INDIAN COMMUNITY,

*Respondent.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Court has held that when Congress makes reservation lands freely alienable, it intends that land to be taxable by state and local governments, unless a contrary intent is clearly manifested. Members of the Keweenaw Bay Indian Community received property in fee simple at their request as the express language of the *1854 Treaty with the Chippewa at LaPointe* provided. The questions presented are:

1. Does the *1854 Treaty with the Chippewa at LaPointe* show the necessary congressional intent to make lands freely alienable?

2. Do the Indian Treaty canons of construction allow courts to resolve on summary judgment factual issues about which experts disagree?

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT ..... 1

REASONS FOR GRANTING THE PETITION ..... 5

I. THE COURT OF APPEALS DECISION CONFLICTS WITH THE PRINCIPLES OF *CASS COUNTY V. LEECH LAKE BAND OF CHIPPEWA INDIANS* AND CASTS DOUBT ON IMPORTANT FEDERAL INDIAN LAW QUESTIONS REGARDING TREATIES AND LAND. ..... 5

II. THE COURT OF APPEALS CREATED A CONFLICT AMONG THE CIRCUITS BY HOLDING THAT LAND MADE FREELY ALIENABLE PURSUANT TO TREATY IS NOT TAXABLE. ..... 8

III. THE COURT OF APPEALS INCORRECTLY DECIDED AN IMPORTANT FEDERAL QUESTION WHEN IT HELD THAT INDIAN TREATY CANONS OF CONSTRUCTION CAN RESOLVE GENUINE ISSUES OF MATERIAL FACT ON SUMMARY JUDGMENT ..... 9

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103; 118 S. Ct. 1940; 141 L. Ed. 2d 90 (1998) ..... 2, 5, 6, 7

*Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943) ..... 10

*County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) ..... 6, 7

*Foster v. Neilson*, 27 U.S. 253; 7 L. Ed 14 (1829) ..... 5

*Goudy v. Meath*, 203 U.S. 146; 27 S. Ct. 48; 51 L. Ed 130 (1906) ..... 6

*Keweenaw Bay Indian Community v. Robert Naftaly, et al*, 370 F.Supp. 2d 620 (W. D. Mich. 2005) ..... 2, 3

*Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. den.*, 512 U.S. 1228 (1994) ..... 4, 8

*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172; 119 S. Ct. 1187; 143 L. Ed. 2d 270 (1999) ..... 9, 10

*Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1944) ..... 10

*United States v. Percheman*, 32 US 51; 8 L. Ed 604 (1833) ..... 5

**Statutes**

28 U.S. C. § 1362 ..... 1

28 U.S.C. § 1254 ..... 1

28 U.S.C. § 1331 ..... 1

28 U.S.C. § 1367 ..... 1

*General Allotment Act*, 24 Stat. 388 (1887) ..... 6

**Other Authorities**

Black's Law Dictionary 76 (7th ed. 1999) ..... 2

**Treatises**

*Treaty with the Chippewa at La Pointe*,
10 Stat. 1109 (September 30, 1854) ..... 1, 2, 3, 10

*Treaty with the Wyandotts*,
10 Stat. 1159 (January 31, 1855) ..... 6

## OPINIONS BELOW

The opinions of the Court of Appeals (App. 1a-35a) are reported at 452 F.3d 514 (6th Cir. 2006). The opinion of the district court (App. 36a-53a) is reported at 370 F.Supp.2d 620 (W.D. Mich. 2005).

## JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1362, and 1367.

The judgment of the Court of Appeals was entered on June 26, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

The relevant treaty provisions are Article 3 and Article 11 of the *Treaty with the Chippewa at La Pointe*.[1] They are set forth in this Appendix, App. 58a.

## STATEMENT

In 1854, the predecessors to the Keweenaw Bay Indian Community entered into the *Treaty with the Chippewa at La Pointe*[2] with the United States ("1854 Treaty"). Besides ceding land in Minnesota and Wisconsin to the United States, the 1854 Treaty created the L'Anse Reservation in Michigan.[3] From the perspective of the United States, one goal of the 1854 Treaty was the "civilization" of the Indians through individual land

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[1] *Treaty with the Chippewa at La Pointe*, 10 Stat. 1109 (September 30, 1854).
[2] *Treaty with the Chippewa at La Pointe*, 10 Stat. 1109 (September 30, 1854).
[3] Article 1, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1109.

ownership. Accordingly, Article 3 of the 1854 Treaty authorized the President of the United States to allot[4] lands in severalty to individual Indians with such restrictions on alienation as he saw fit to impose.[5]

The Keweenaw Bay Indian Community feared removal to Minnesota. One way they sought to avoid removal was to own property individually and become citizens of Michigan. Another way was to include language in the 1854 Treaty directly addressing their fears. Article 11 stated in relevant part: "All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove from the homes hereby set apart for them."[6]

Beginning in the mid 1870s the President began to allot land to individual Indians in the L'Anse Reservation by written regulations. Initially, only a few American Indians received allotments without restrictions on alienation. By 1912 almost all available land on the L'Anse Reservation had been allotted and assigned to individuals. The district court ruled and the Community conceded that the allotments and the removal of restrictions on the allotments complied with the 1854 Treaty and the law.[7]

In 1998, this Court decided *Cass County v. Leech Lake Band of Chippewa Indians*,[8] and announced the principle that "when Congress makes reservation lands freely alienable, it is unmistakably clear that Congress intends that land to be taxable by state and local governments, unless a contrary intent is clearly manifested."

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[4] Allotment is "the selection of specific land awarded to an individual allottee from a common holding." Black's Law Dictionary 76 (7th ed. 1999).

[5] Article 3, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1110.

[6] Article 11, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1111.

[7] *Keweenaw Bay Indian Community v. Robert Naftaly, et al*, 370 F.Supp. 2d 620, 628 (W. D. Mich. 2005).

[8] *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113; 118 S. Ct. 1940; 141 L. Ed. 2d 90 (1998).

In February 1999, the Michigan State Tax Commission, of which petitioners are members or the executive secretary, sent a bulletin to assessors and equalization directors instructing them to place all real property owned in fee simple by American Indian communities and members on the assessment roles.

In August 2003, the Keweenaw Bay Indian Community (Community) brought an action for injunctive relief against members of the Michigan State Tax Commission and Department of Treasury (State) alleging that the State could not levy its *ad valorem* tax on property held in fee simple by the Community or its members within the Community's L'Anse Reservation. The District Court first denied an initial motion for dismissal or summary disposition by the State. The Community then filed a motion for summary disposition and the State filed a second motion for summary judgment. The District Court granted the Community's motion and denied the State's second motion on May 27, 2005. First, the District Court found that despite "conflicts" between experts, there was no genuine issue of material fact over Indian understanding of the 1854 Treaty.[9] The Court found "that the removal language in the 1854 Treaty includes removal due to a tax sale for non-payment of *ad valorem* property taxes."[10] Second, finding that "[n]one of the aforementioned Supreme Court decisions expressly apply to Indian reservation lands made alienable pursuant to a treaty, which is not an act of Congress, but rather, a contract between sovereign nations," the District Court then granted summary disposition to the Community.[11]

By a 2-1 vote the Court of Appeals affirmed the District Court's opinion on June 26, 2006. Finding defendants' expert reports "not . . . persuasive in the present context" (App. 20a), the majority ruled that there was no genuine issue of fact about the meaning of the 1854 Treaty and upheld the grant of summary

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[9] *Keweenaw Bay Indian Community*, 370 F.Supp. 2d at 627, 630.

[10] *Keweenaw Bay Indian Community*, 370 F. Supp. 2d at 628.

[11] *Keweenaw Bay Indian Community*, 370 F. Supp. 2d at 628.

judgment to the Keweenaw Bay Indian Community. The majority then ruled that the 1854 Treaty itself was not sufficient "to demonstrate the clear congressional intent necessary to allow state taxation of reservation lands" because it "is not a federal statute or act of Congress." (App. 28a.) In doing so it expressly disagreed with the Ninth Circuit's holding in *Lummi Indian Tribe v. Whatcom County*[12] that land made freely alienable under a treaty is taxable by state and local governments. (App. 30a, n 14.)

In a dissent, Court of Appeals Judge Guy followed *Lummi Indian Tribe*. He could not "find in the Treaty anything from which I can reasonably conclude that once this land became freely alienable, it should escape taxation." (App. 35a.) He also found that it "clear that, in a historical context, what was referenced when 'removal' was mentioned was relocation of the tribe, and it had nothing to do with what might happen when freely alienable land was under individual ownership." (App.35a.)

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[12] *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. den.*, 512 U.S. 1228 (1994).

## REASONS FOR GRANTING THE PETITION

### I. THE COURT OF APPEALS DECISION CONFLICTS WITH THE PRINCIPLES OF *CASS COUNTY V. LEECH LAKE BAND OF CHIPPEWA INDIANS* AND CASTS DOUBT ON IMPORTANT FEDERAL INDIAN LAW QUESTIONS REGARDING TREATIES AND LAND.

In *Cass County v. Leech Lake Band of Chippewa Indians*, the Court held that "when Congress makes reservation lands freely alienable, it is unmistakeably clear that Congress intends that land to be taxable by State and local governments, unless a contrary intent is clearly manifested."[13] This case raises the question of whether this principle applies to land allotted and made freely alienable *under a federal treaty*. It should. The Sixth Circuit's refusal below to hold that it did conflicts with the *Cass County* principle that alienability is the crucial concept in deciding whether reservation land is taxable by state and local governments.

This Court in *Cass County* emphasized the importance of alienability in determining taxability in several ways. First, the decision clearly covers all reservation lands made freely alienable by statute. The question of whether it covers reservation lands made freely alienable by treaty remains technically open because *Cass County* did not involve land made freely alienable by treaty.

Nonetheless, the *Cass County* Court's broad statement of the principle applies equally well to land made freely alienable by treaty. Self-executing treaties are the law of the land.[14] The ratification process ensures that treaties reflect the considered judgment of two-thirds of the United States Senate. By declaring

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[13] *Cass County*, 524 U.S. at 113.

[14] *Foster v. Neilson*, 27 U.S. 253, 314; 7 L. Ed 14 (1829), *overruled on other grounds, United States v. Percheman*, 32 US 51; 8 L. Ed 604 (1833).

that treaties do not reflect the will of Congress as statutes do, the Sixth Circuit below has thrown into question the accepted constitutional position of self-executing treaties, including treaties with American Indian tribes, as law of the land.

Second, the *Cass County* Court emphasized that two earlier cases, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*[15] and *Goudy v. Meath*,[16] turned on the reservation land being "rendered freely alienable."[17]

In *Goudy*, this Court directly considered land allotted and made freely alienable pursuant to a treaty.[18] In this Court Goudy argued that there was "no express repeal of the [tax] exemption" in Article 6 of the 1854 Puyallup Treaty.[19] The *Goudy* Court rejected this argument: "Congress may grant the power of voluntary sale, while withholding the land from taxation or forced alienation, may be conceded. For illustration, see treaty of January 31, 1855, with the Wyandots."[20] But to do so, Congress must make its intent "clearly [manifest]."[21] The *Goudy* Court did not make any distinction between land made freely alienable by treaty and land made freely alienable by statute.

In *Yakima*, this Court held that land made freely alienable pursuant to the General Allotment Act was taxable.[22] The *Yakima* Court also emphasized that *Goudy* turned on alienability. It held that the *Goudy* decision "did not rest exclusively, or even primarily, on the § 6 [of the General Allotment Act][23] grant of personal jurisdiction over allottees to sustain the land taxes at

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[15] *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 263-264 (1992).
[16] *Goudy v. Meath*, 203 U.S. 146; 27 S. Ct. 48; 51 L. Ed 130 (1906).
[17] *Cass County*, 524 U.S. at 111.
[18] *Goudy v Meath*, 38 Wash. 126, 127 (1905), *aff'd*, 203 US 146 (1906).
[19] *Goudy*, 203 U.S. at 149.
[20] *Goudy*, 203 U.S. at 149. Article 4 of the 1855 Treaty with the Wyandotts specifically and expressly stated that freely alienable lands would not be taxable. *Treaty with the Wyandotts*, 10 Stat. 1159, 1161 (January 31, 1855).
[21] *Goudy*, 203 U.S. at 149.
[22] *County of Yakima*, 502 U.S. at 267-268.
[23] *General Allotment Act*, 24 Stat. 388 (1887).

issue. Instead, it was the *alienability of the allotted lands* . . . that the Court found of central significance."[24]

Finally, in *Cass County* this Court made no distinction between land made freely alienable pursuant to statute and land made freely alienable pursuant to treaty. It stated that "[i]n *Goudy*, Congress had made reservation land alienable by authorizing the President to issue patents to individual members of the Puyallup Tribe" in a treaty.[25]

This Court has addressed the taxability of freely alienable reservation land three times. Each time it has emphasized the principle that freely alienable land is taxable by state and local governments. It has never distinguished between land made freely alienable pursuant to treaty and that made freely alienable pursuant to statute. Distinguishing between the two raises serious and previously unknown questions about the legal status of treaties. In this important area of federal Indian law, the Court of Appeals decision threatens to create two rules where before there was only one. There is no basis to support such a distinction.

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[24] *County of Yakima*, 502 U.S. at 691.
[25] *Cass County*, 524 U.S. at 111.

## II. THE COURT OF APPEALS CREATED A CONFLICT AMONG THE CIRCUITS BY HOLDING THAT LAND MADE FREELY ALIENABLE PURSUANT TO TREATY IS NOT TAXABLE.

The Court of Appeals acknowledged that it "disgree[d] with the holding of the *Lummi* decision." (App. 30, n. 4.) In *Lummi Indian Tribe v. Whatcom County*, the Ninth Circuit squarely held that that reservation land made freely alienable under a treaty is taxable.[26] The Court of Appeals decision below created, therefore, an irreconcilable conflict among circuits.

The *Lummi* Court primarily relied on *Yakima* and *Goudy* in reaching its decision. Noting that that the *Yakima* Court "made no distinction between fee land allotted by treaty and that allotted under the [General Allotment] Act,"[27] the *Lummi* Court stated:

> The logic propounded by the *Goudy* Court and approved by *Yakima Nation* requires an Indian, even though he receives his property by treaty, to accept the burdens as well as the benefits of land ownership. This proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear. The strength of the language in *Yakima Nation*, however, makes virtually inescapable the conclusion that the Lummi land is taxable if it is alienable.[28]

This conflict between *Lummi* and the Court of Appeals decision below is important because it creates doubt in an otherwise clear area of the law. Two different circuits have ruled differently on exactly same issue. There are many treaties that

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[26] *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1356, 1358 (CA 9, 1993), *cert. den.*, 512 U.S. 1228 (1994).
[27] *Lummi Indian Tribe*, 5 F.3d at 1357.
[28] *Lummi Indian Tribe*, 5 F.3d at 1358.

allotted land to individual American Indians. Land allotted pursuant to those treaties now faces different treatment based on whether the Ninth Circuit or the Sixth Circuit precedent is followed. The Sixth Circuit precedent will also negatively impact state tax revenues by removing land from the tax rolls. In a time where state tax revenues are often declining, this is important.

## III. THE COURT OF APPEALS INCORRECTLY DECIDED AN IMPORTANT FEDERAL QUESTION WHEN IT HELD THAT INDIAN TREATY CANONS OF CONSTRUCTION CAN RESOLVE GENUINE ISSUES OF MATERIAL FACT ON SUMMARY JUDGMENT.

The dissent in the Court of Appeals found that "it is clear that, in historical context, what was referenced when 'removal' was mentioned was relocation of the tribe, and it had nothing to do with what might happen when freely alienable land was under individual ownership." (App. 35a.) Relying on the canons of construction for Indian Treaties, however, the majority in the Court of Appeals held that there was no genuine issue of material fact sufficient to prevent the granting of summary judgment to Keweenaw Bay Indian Community on the issue of whether the 1854 Treaty prohibited State taxation of fee simple land owned by the Community or its members on the reservation because tax reversion was the equivalent of removal. (App. 22a.) This improper use of the canons of construction created an important question about whether the canons of construction for Indian treaties can resolve genuine issues of material fact on summary judgment.

The canons for construction for Indian treaties are well-known. In interpreting treaties with American Indian nations, courts should consider the "history of the treaty, the negotiations, and the practical construction adopted by the parties."[29] Courts "interpret Indian treaties to give effect to the terms as the Indians

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[29] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196; 119 S. Ct. 1187; 143 L. Ed. 2d 270 (1999) (quotation marks and citation omitted).

themselves would have understood them."[30] Finally, "Indian treaties are to be interpreted liberally in favor of the Indians, and . . . any ambiguities are to be resolved in their favor."[31]

The canons of construction for Indian treaties are not, however, an excuse for resolving genuine issues of material fact on summary judgment. "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."[32] And while all doubts should be resolved in the tribe's favor, "language should be construed in accordance with the tenor of the treaty."[33]

Using these canons of construction, petitioners created a genuine issue of material fact on Indian understanding of the 1854 Treaty. Article 3 of the 1854 Treaty authorized the President to allot land to individual Indians with such restrictions on alienation as he saw fit as part of the "civilization" process.[34] It contained no language exempting the individual Indians from paying state taxes on the land held in fee simple by them.

Article 11 of the 1854 Treaty promised, however, that "the Indians shall not be required to remove from the homes hereby set apart for them."[35] Respondents argued that the Indians understood this language to mean that they would not have to pay taxes on allotted land held in fee simple because the Indians would have rejected a treaty that required them to pay taxes on the reservation. (App. 18a.)

This conflates the two separate issues, as petitioners' expert Dr. Anthony Gulig showed. He submitted a historical report that showed that the American Indians understood article 3 applied to individual land ownership through which they could become

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[30] *Mille Lacs*, 526 U.S. at 196 (citations omitted).
[31] *Mille Lacs*, 526 U.S. at 200 (citations omitted).
[32] *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943).
[33] *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1944).
[34] Article 3, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1110.
[35] Article 11, *Treaty with the Chippewa at La Pointe*, 10 Stat. at 1111.

citizens of the state of Michigan and that article 11 applied to removal of the Tribe from Michigan to Minnesota or elsewhere by the federal government. This created a genuine issue of material fact sufficient to withstand a motion for summary judgment.

By resolving a conflict between experts on summary judgment, the Court of Appeals has created an important question about how to interpret Indian treaties. Should treaties be interpreted in their historical context as the dissent argued, or should the canons of construction for Indian treaties be mechanically applied to resolve genuine issues of material fact on summary judgment?

## CONCLUSION

This Court should accept certiorari to resolve conflicts between the principles of its cases and to resolve the conflict that now exists between the Sixth and Ninth Circuits. The Court of Appeals also resolved a genuine issue of material fact on summary judgment through its mechanical application of the canons of construction for Indian treaties. This creates an important issue about how history is used in interpreting Indian treaties.

The petition for writ of certiorari should be granted.

Respectfully submitted

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Dated: September, 2006

# APPENDIX

## APPENDIX TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Sixth Circuit.....1a

Opinion of the United States District Court.....36a

Order of United States District Court Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Motion for Summary Judgment.....54a

Judgment of the United States Court of Appeals for the Sixth Circuit.....56a

Mandate of United States Court of Appeals for the Sixth Circuit .....57a

Treaty Language..... 58a

*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 206
File Name: 06a0207p.06

# UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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KEWEENAW BAY INDIAN COMMUNITY,
*Plaintiff-Appellee,*

No. 05-1952

*v.*
ROBERT NAFTALY, et al.,
*Defendants-Appellants,*

TOWNSHIP OF L'ANSE, et al.,
*Defendants.*

Appeal from the United States District Court
for the Western District of Michigan at Marquette.
No. 03-00170—David W. McKeague, District Judge.

Argued: April 26, 2006

Decided and Filed: June 26, 2006

Before: GUY, DAUGHTREY, and CLAY, Circuit Judges.

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## COUNSEL

**ARGUED:** Todd B. Adams, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellants. Vernle C. Durocher, DORSEY & WHITNEY, Minneapolis, Minnesota, for Appellee.
**ON BRIEF:** Todd B. Adams, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellants. Vernle C. Durocher, Mary J. Streitz, DORSEY & WHITNEY,

Minneapolis, Minnesota, John R. Baker, KEWEENAW BAY INDIAN COMMUNITY, Baraga, Michigan, Stephen D. Turner, Gregory N. Longworth, LAW, WEATHERS & RICHARDSON, Grand Rapids, Michigan, for Appellee.

CLAY, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. GUY, J. (p. 19), delivered a separate dissenting opinion.

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## OPINION

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CLAY, Circuit Judge. Defendants Naftaly, et al., appeal the June 1, 2005 order of the United States District Court for the Western District of Michigan granting Plaintiff Keweenaw Bay Indian Community's motion for summary judgment, entering the declaratory judgment that the Michigan General Property Tax Act ("Act"), Mich. Comp. Laws § 211.1 *et seq.*, was not valid as applied to real property held in fee simple by Plaintiff or its members within the exterior boundaries of the L'Anse Indian Reservation, and enjoining Defendants from enforcing the Act against said real property. For the following reasons, we **AFFIRM** the order of the district court.

### I. BACKGROUND

### A. PROCEDURAL HISTORY

On August 13, 2003, Plaintiff filed a complaint in the United States District Court for the Western District of Michigan seeking declaratory and injunctive relief against Defendants. The suit was in response to Defendants' attempts to assess, collect, and enforce *ad valorem* taxes under the Act against real property within the L'Anse reservation held by Plaintiff or its members in fee simple.

On December 12, 2003, Defendants filed a motion to dismiss under Federal Rules of Procedure 12(b)(1) and 2(b)(6). On September 27, 2004, the district court denied the motion.

On October 26, 2004, Defendants filed a motion to dismiss under Rule 12(b)(6) and a motion for summary judgment under Rule 56. On December 17, 2004, Plaintiff filed a motion for summary judgment under Rule 56 on Counts I and II of its complaint. Count I alleged that Plaintiff was entitled to declaratory and injunctive relief because Congress had not clearly authorized state taxation of the real property at issue. Count II alleged that Plaintiff was entitled to declaratory and injunctive relief because application of the Act would violate the terms of the 1854 Treaty. On June 1, 2005, the district court denied Defendants' motion for summary judgment, granted Plaintiff's motion for summary judgment, entered a declaratory judgment that the Act was not valid as applied to the real property at issue, and enjoined Defendants from enforcing the Act against said real property. On June 28, 2005, Defendants timely filed a notice of appeal.

## B. FACTS

### 1. The Parties

Plaintiff is a federally recognized American Indian tribe and is the successor in interest of the L'Anse and Ontonagon bands of Chippewa Indians. Plaintiff exercises powers of self-governance and jurisdiction over the L'Anse Indian Reservation in Baraga County, Michigan.

Defendant Robert Naftaly is the chairperson of the Michigan State Tax Commission ("Commission"). Defendant Robert Lupi is a member of the Commission. Defendant Doug Roberts is a member of the Commission. Defendant Dennis Platte is the executive secretary of the Commission. Plaintiff sued these Defendants in their official capacities. These Defendants are the appellants in the instant case.

Defendant L'Anse Township is a political and corporate body of the state of Michigan. Defendant assesses, collects, and enforces real property taxes under the Act. Defendant Baraga Township is a political and corporate body of the state of Michigan. Defendant assesses, collects, and enforces real property taxes under the Act. Defendant Matthew Arko is the assessor for L'Anse Township and Baraga Township. These Defendants did not appeal the district court's decision.

## 2. The History Preceding the 1854 Treaty

The following historical account was found by a district court in a case unrelated to the case before this Court, *Keweenaw Bay Indian Community v. State of Michigan*, 784 F. Supp. 418 (W.D. Mich. 1991):

> The Keweenaw Bay is located on the southern shore of Lake Superior in Michigan's Upper Peninsula. From the earliest records there existed a band of Lake Superior Chippewa Indians near the mouth of the Bay, on an east-west transportation corridor used by the Indians and later by fur traders. The Indians subsisted before the coming of European society, consistent with their traditional lifestyle, which included annual rounds of hunting and trapping in the Winter and fishing in the Spring, Summer and Fall. The Lake Superior Chippewas' lifestyle was first impacted by contact with the French, followed by the English and finally by the Americans. Euro-American contacts exposed the Chippewa, inter alia, to Christianity, a new kind of market economy, greed and avarice for their lands, intoxicants, disease, and a new style of dress and abode. These contacts, of course, did not supplant their culture.
>
> . . . .
>
> The 1832 expedition of Henry Schoolcraft, followed by Douglas Houghton's famous exploration of the western Upper Peninsula, outlined the immense mineral reserves

of the Western Range and the Keweenaw Peninsula, which were all held at that time by the Indians, pursuant to their unextinguished aboriginal title. Not surprisingly, these rich mineral deposits evoked considerable interest from land speculators, miners, and the federal government.

The United States Congress appropriated money on March 3, 1841, to defray expenses of entering into a treaty with the Chippewa for the extinguishment of their title within the State of Michigan where the mineral deposits were found. The Treaty with the Chippewa, 7 Stat. 591, was subsequently negotiated on October 4, 1842, under which the Indians conveyed to the United States their aboriginal title to the entire western half of Michigan's Upper Peninsula, including the Keweenaw Bay area, and to all of northern Wisconsin. Although Article III of the treaty provided for the eventual removal of the Indians to an area to the west occupied by the Mississippi Chippewa, it was thought that such removal would not take place for a considerable time in the future. Ex. P-7. In Article II, the Indians stipulated for the right to hunt in the ceded territory, together "with the other usual privileges of occupancy, until required to remove by the President of the United States . . . ." Article VI provided that the Indians would be subject to removal from the mineral district at the pleasure of the President. It was contemplated that this limited removal from the mineral areas, if it occurred, would not move the Indians out of the remainder of their cession area. Article IV provided for the payment of annuities and the furnishing of goods and services to the Indians, including blacksmiths and carpenter shops, and schools. Notwithstanding the cession of title, the United States' laws with respect to trade and intercourse with non-Indians were to remain in effect in the ceded territory.

The events at Keweenaw Bay following the signing of the 1842 Treaty were significant. In accord with the treaty,

farmers and blacksmiths were provided to the L'Anse band, along with funding to the mission boards in order to provide schools for the Indians. Although the treaty did not provide for land reservations, by all accounts the Indians were advised, and they so understood, that their lifestyle would be essentially unchanged after the treaty because the government only sought their minerals. Notwithstanding these assurances, the Indians, who did not want to remove, were very apprehensive about that potential. Of course, the threat of removal at that time seemed remote because the Indians were not living within the two important mineral districts in the area. The Indians' comfort was short-lived, however, due to the commencement of land surveying in 1845, which meant that legal descriptions could be made and land could be sold. To the Indians, land sales meant that their removal was likely and imminent.

On February 6, 1850, the President issued a removal order, pursuant to the 1842 Treaty. I Tr. 159. However, that order was subsequently withdrawn in August, 1851, and the Indians were never actually required to remove. II Tr. 164. Nevertheless, according to Henry C. Gilbert, the Michigan Indian agent who negotiated the subsequent 1854 treaty, removal was "the great terror of their [the Indians'] lives and I hazard nothing in saying they will sooner submit to extermination than comply with it." Ex. P-25; II Tr. 166.

The survey of the Upper Peninsula area around Keweenaw Bay was completed in 1848. Some land purchases began to occur on both sides of the Bay at about that time. Numerous urgent letters and petitions from Indians and their representatives to Indian agents and the President evidenced concern about removal and revealed a desire to purchase land around the Bay by and for the benefit of the Indians. . . . Many Indians in the Keweenaw Bay area adopted American-style (or non-Indian) names, clothing, houses, and other customs. Some

swore allegiance to the United States before a magistrate. These accommodations to American culture were often intended to demonstrate the Indians' advanced degree of "civilization". It was hoped by some that such accommodations would convince the government to grant them citizenship and permit them to remain in their homes rather than force them to remove to the west. Ex. D-71; VI Tr. 792; VII Tr. 906-907. A consistent Indian theme throughout the period of removal and prior to the 1854 Treaty was an ardent desire for permanent homes for the Indians in their present locations.

. . . .

The evidence indicates that in the 1840's, the federal government's policy towards Indians, known as "removal," was being abandoned. Removal was characterized by the movement of tribes from the eastern portion of the United States to lands to the west, out of the path of western settlement by non-Indians. The removal policy became antiquated as the settlement patterns of non-Indians moved inexorably westward. It became clear in the 1840's that there was rapidly becoming no place to move the Indians. II Tr. 184-5. The benevolent rationale for the removal was to isolate the Indians from the adverse impacts resulting from their contacts with non-Indian society. Of course, the primary motivation was to free Indian lands from their claims to them so the lands could be settled by non-Indians.

This same rationale underlay the creation of the reservation system, which replaced the removal policy. II Tr. 186. The separatism that was hoped for could no longer be achieved through removal. However, Commissioner George W. Manypenny believed that the civilization policy could be achieved through the reservation system. Thus, he believed that if the Indians were temporarily isolated on discrete parcels, away from the deleterious influence of non-Indians, they could

gradually become assimilated or "civilized" and eventually could be incorporated completely into non-Indian society. VII Tr. 1022. The reservation concept as a "way-station" was a necessary step, then, in the civilization process. VII Tr. 967.

. . . The new policy of the government was to provide "permanent homes" on the reservations that were set aside for the Indians and upon which trespass by non-Indians would not be tolerated. Additionally, there were three evils attendant to the government's policy in the past, which Manypenny sought to avoid in the future: first, the payment to the Indians of excessive annuities, which promoted profligacy and the consumption of intoxicants; second, excessive quantities of land held in common; and third, continued changes in location in advance of the western movement of settlers. The 1854 Treaty, as well as others negotiated during this period, were intended to address these articulated evils.

Correspondence from Commissioner Manypenny to the Indian agents about to undertake treaty negotiations with the Lake Superior Chippewa in the early 1850's is critical to an understanding of the government's intentions. One of the four letters of instruction from Commissioner Manypenny to Henry C. Gilbert provides:

> I send herewith a copy of the instructions of the Secretary of War of the date of 4th June of 1847 when a former commissioner attempted to treat with these indians but failed. According to the estimates of this office, the Chippewa own about 10,743,000 acres of land, the greater part of which is of no value to them, and never will be. Some portions of it will be valueless to the white population.
>
> Nevertheless, the condition of affairs with the Chippewas is such that it is the duty of the

> Government to offer them an opportunity to dispose of their tenure to their Country, and in lieu thereof, to give them a small tract as a permanent home, with such means of support & mental & moral improvement as may be of great advantage to them.

*Id.* at 420-23.

### 3. The 1854 Treaty

On September 30, 1854, the President of the United States and the Chippewa Indians of Lake Superior and Mississippi entered into a treaty ("1854 Treaty"). Treaty with the Chippewa, September 30, 1854, 10 Stat. 1109. Under the 1854 Treaty, the Chippewa Indians ceded to the United States a substantial amount of land in eastern Minnesota. In exchange, the United States set aside permanent reservations for the various bands of Lake Superior and Mississippi Chippewa. The United States also provided annuities, goods, and services in consideration of the cessation.

Article 3 of the 1854 Treaty outlined certain powers the President maintained with respect to the reservation lands:

> The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange

> for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Importantly for the instant case, the President had the power to assign land to individual Chippewa Indians, and he also had the power to place restrictions on these allotments, as well as the power to remove such restrictions. One such restriction would be a restriction on alienation.

Article 10 allowed missionaries, teachers, and other non-Chippewa Indians who resided in the ceded territory or the reservations to remain on their occupied land at a minimum price.[1]

Article 11 listed certain restrictions placed upon the United States:

> All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory

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[1] A district court ruled that the lands allocated pursuant to Article 10 of the 1854 Treaty that were within the boundaries of the reservation constituted a part of the reservation. *Keweenaw Indian Bay Cmty.*, 784 F. Supp. at 424-25. The court also concluded that parcels of land sold by the United States to non-Indians before the 1854 Treaty that were within the boundaries of the reservation also constituted a part of the reservation. *Id.* In sum, the court concluded that the physical description of the reservation as provided for in Article 2 of the treaty defined the exterior boundaries of the reservation, regardless of the fact that certain non-Indians owned real property within those boundaries. That decision was not appealed.

hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

The 1854 Treaty was ratified on January 10, 1855. Subsequently, the President periodically assigned parcels of the reservation to individual Chippewa Indians pursuant to his power under Article 3 of the treaty. The real property in dispute in the instant case are those parcels allocated under Article 3 and those parcels allocated under Article 10 that are now in the possession of Plaintiff or its members.

**4. Tax Treatment of Real Property Within the Reservation**

After the 1854 Treaty, none of the lands within the reservation held by Plaintiff's predecessor tribes or its members in fee was subject to the Act and its *ad valorem* real property tax. In 1982, the Michigan Tax Tribunal explicitly held that lands held by Plaintiff and its members were not subject to the Act; however, the tribunal held that lands within the boundaries as described by Article 2 of the 1854 Treaty that were sold by the United States prior to the ratification of the treaty were not part of the reservation and were subject to taxation. *Baraga County Equalization Dep't v. Darcy*, MTT Docket No. 29713 (Feb. 23, 1982).

In 1991, a district court held that lands sold by the United States prior to the ratification of the 1854 Treaty were a part of the reservation. *Keweenaw Indian Bay Cmty.*, 784 F. Supp. at 424-25. *See also* note 1, *supra*. After this ruling, Plaintiff filed a motion in district court to hold the state of Michigan in contempt for failing to prevent Baraga Township and Baraga County from seeking taxes on those lands sold prior to the 1854 Treaty. The district court held that the imposition of such taxes was improper in light of the previous ruling that those lands were part of the reservation, but it did not hold the state in contempt, as the state had not been allowed to correct the actions of the town and the county. *Keewenaw Bay Indian Cmty. v. State of Michigan*, No. 2:87-CV-00278-RHB (W.D. Mich. Nov. 19, 1991).

In 1992, the Michigan state treasurer filed a petition in state court seeking the sale of certain real property held by Plaintiff or its members due to tax delinquencies. Plaintiff and its members objected to the sale of the lands. The state court dismissed the objections of Plaintiff and its members on the ground that the Michigan Tax Tribunal had exclusive jurisdiction over the case, but the court stayed the sale. In March 1993, Plaintiff and its members filed their objections to the sale of the lands with the Michigan Tax Tribunal. In March 1994, the Michigan Tax Tribunal entered a consent judgment with respect to Plaintiff and its members, L'Anse Township, Baraga Township, and Baraga County. The consent judgment found that real property held by Plaintiff or its members that was within the exterior boundaries of the reservation was exempt from *ad valorem* taxes under the Act. As a result, such property was to be taken off of the assessment rolls and listed as exempt. These exempt properties, however, were placed on a special "tribal assessment roll," and Plaintiff and its members would pay exactly the amount of taxes that would have been due had the properties been kept on the ordinary assessment roll.

From May 1994 to February 1999, the parties followed the dictates of the consent judgment. In February 1999, the Commission sent a bulletin to assessors and equalization directors instructing them to place all real property owned by American Indian communities and their members on the assessment rolls. This decision was based on the Commission's reading of *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

In February 1999, L'Anse Township, Baraga Township, Baraga County, and two of Plaintiff's members filed a writ of mandamus in state court to prevent the Commission from interfering with the consent judgment. The state trial court issued the writ of mandamus. The state court of appeals affirmed, holding that the Commission was barred by principles of *res judicata* from interfering with the consent judgment. The state supreme court reversed and found that the Commission was not

bound by the consent judgment, although the court did not address the validity of *ad valorem* taxes on real property held by Plaintiff or its members.

In February 2003, the Commission ordered Defendant Arko to place real property held by Plaintiff or its members on the 2003 assessment rolls. Defendant Arko did so and mailed assessment notices to Plaintiff and its members. The Commission also ordered Defendant Arko to place such property on the 1999, 2000, 2001, and 2002 assessment rolls for L'Anse Township and the 2000, 2001, and 2002 assessment rolls for Baraga Township. Defendants L'Anse Township and Baraga Township issued *ad valorem* tax bills for real property held by Plaintiff or its members that was located within the exterior boundaries of the reservation. Throughout the dispute, Plaintiff and its members continued to abide by the consent judgment and paid the equivalent of the taxes that would have been owed on their holdings of real property if such property were on the ordinary assessment rolls.

## II. DISCUSSION

### A. THE PROPER INTERPRETATION OF THE 1854 TREATY

#### 1. Standard of Review

This Court reviews the district court's decision on a motion for summary judgment *de novo*. *Turner v. City of Taylor*, 412 F.3d 629, 637 (6th Cir. 2005) (citation omitted). The moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the facts and all of the inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

## 2. Analysis

The district court did not err in granting summary judgment in favor of Plaintiff on the ground that the 1854 Treaty disallows involuntary alienation of real property held by Plaintiff or its members. While Defendants offered an alternative interpretation of the 1854 Treaty, principles of American Indian treaty construction support the district court's decision.

### a. Legal Framework

The Supreme Court's modern jurisprudence with respect to the interaction of state tax laws and treaties with American Indians is based in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). In that case, the plaintiff, a Navajo Indian, challenged the state taxation of her income, which was derived solely from activity within the Navajo reservation. *Id.* at 165-66. Before addressing the merits of the plaintiff's claim, the Supreme Court emphasized that there was a "deeply rooted" policy of preventing a state from asserting jurisdiction or otherwise interfering with American Indians. *Id.* at 168 (citation omitted). Indeed, in *Worcester v. Georgia*, "Chief Justice Marshall held that Indian nations were 'distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.'" *Id.* (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832)). The notion that American Indians constituted a separate entity not subject to the laws of the state was known as the Indian sovereignty doctrine. The Court noted that under that doctrine, the Court had rejected a state's attempt to tax the lands within an American Indian reservation. *Id.* at 169 (citing *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867)).

The Court recognized that the Indian sovereignty doctrine had evolved and that there were certain instances where a state could impose its laws on American Indians and on actions that

occurred on reservation lands. *Id.* at 171-72. The Court explained:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides *a backdrop against which the applicable treaties and federal statutes must be read.* It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. . . . But it is nonetheless still true . . . that "(t)he relation of the Indian tribes living within the borders of the United States . . . (is) an anomalous one and of a complex character. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

*Id.* at 172-73 (alterations in the original) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)) (emphasis supplied).

Turning to the facts in the case, the Supreme Court held that the treaty with the Navajo Indians precluded the state from extending state tax law to Navajo Indians on the reservation. *Id.* at 174-75. Although the treaty did not contain an express provision that disallowed state taxation of the Navajo Indians, the Court recognized that the treaty was "not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions." *Id.* at 174. The Court recognized that American Indians, such as the Navajo, signed treaties under duress and in hopes of creating a permanent home for themselves. *Id.* "It is circumstances such as these which have led this Court in interpreting Indian treaties, to adopt the general rule that '(d)oubtful expressions are to be resolved in favor of the

weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" *Id.* (alteration in the original) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). Relying on "this canon of construction" in conjunction with the backdrop of Indian sovereignty, the Court concluded that the treaty established a reservation where the Navajo Indians had exclusive sovereignty under general federal supervision, such that the state could not tax activities on the reservation. *Id.* at 174-75.

Treaty construction in favor of American Indians has a well-established pedigree. In *The Kansas Indians*, the Supreme Court noted:

> [E]nlarged rules of construction are adopted in reference to Indian treaties. In speaking of these rules, Chief Justice Marshall says: "The language used in treaties with the Indians *shall never be construed to their prejudice*, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty."

72 U.S. (5 Wall.) at 760 (quoting *Worcester*, 31 U.S. (6 Pet.) at 582) (emphasis supplied). Under this principle, the Supreme Court interpreted a treaty with the Miami Indians, which stated that reservation lands were exempt from "levy, sale, execution, and forfeiture," as preventing state taxation of those lands. The Court reasoned:

> Applying this principle [of treaty construction] to the case in hand, is it not evident that the words "levy, sale, and forfeiture" are susceptible of meaning, which would extend them to the ordinary proceedings for the collection of taxes? Taxes must be first levied, and they cannot be realized without the power of sale and forfeiture, in case of non-payment. The position, it seems to us, is too plain for argument. The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians. In order to accomplish this object, they must be relieved

> from every species of levy, sale, and forfeiture–from a levy and sale for taxes, as well as the ordinary judicial levy and sale.

*Id.* at 760-61.

The Supreme Court recently reaffirmed the principle of treaty construction in favor of American Indians in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). There, the Court stated: "[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Id.* at 196 (citations omitted). The Court continued: "We have held that Indian treaties are to be interpreted liberally in favor of the Indians, . . . and that any ambiguities are to be resolved in their favor . . . ." *Id.* at 200 (citations omitted). *See also Winters v. United States*, 207 U.S. 564, 576-77 (1908) ("By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.").

**b. Application to This Case**

The district court did not err in granting summary judgment in favor of Plaintiff. The district court's interpretation of the 1854 Treaty, finding that the treaty prevented involuntary state alienation and therefore state taxation of real property, comports with the backdrop of American Indian sovereignty and principles of treaty construction in favor of American Indians.

The focus of the analysis is Article 11 of the 1854 Treaty, which states, in relevant part, "[T]he Indians shall not be required to remove from the homes hereby set apart for them." Plaintiff asserts that the provision disallows any form of involuntary alienation, including the sale of real property in fulfillment of a tax judgment. In support, Plaintiff offered the expert opinion and report of Dr. Charles E. Cleland ("Cleland"), Distinguished

Professor Emeritus of anthropology and ethnohistory at Michigan State University. Cleland observed that, at the time of the 1854 Treaty, the Lake Superior Chippewa were very concerned with the prospect of removal from their homelands, and they were "particularly anxious" to broker an agreement to create permanent reservations for themselves. That agreement, the 1854 Treaty, contained Article 11, which Cleland gave the following interpretation: "Article 11 solemnly guarantees that the signatory band would never be required involuntarily to leave or give up their reservations created by the treaty for any reason." (J.A. at 254.) Cleland opined that imposition of state tax liability on real property, and the concomitant power to place tax liens on real property, "would be fundamentally contrary to the purpose of the treaty, that is, to provide secure and permanent homes for the [Chippewa Indians]." (J.A. at 255.) Cleland came to the ultimate conclusion:

> Certainly [the Chippewa Indians] did not understand the idea of taxation as a condition of holding their permanent reservation. If, in 1854 [federal agent] Gilbert had told the [Chippewa Indians] that they had to pay money each year to hold their land, the [Chippewa Indians], who had very limited access to hard currency, would have most certainly objected. In fact, they would not have signed the treaty. Gilbert made this point with Commissioner Manypenny when he reported on the draft treaty. "We found that the points most strenuously insisted upon by them were first *the privilege of remaining* in the country where they reside and next the appropriation of land for their future homes. Without yielding these points, it was idle for us to talk about a treaty. We therefore agreed to the selection of lands for them in the territory heretofore ceded." (emphasis in the original)

(J.A. at 79) (footnote omitted).

In response, Defendants assert that the Chippewa Indians intended to subject themselves to state taxes under the 1854 Treaty, as they were eager to participate as citizens of the United

States and the states where they resided. In support, Defendants offered the expert opinion and report of Dr. Anthony G. Gulig ("Gulig"), an assistant professor at University of Wisconsin-Whitewater. Gulig found that, in the time preceding the 1854 Treaty, "the Lake Superior Chippewas . . . were not merely opposed to removal, but many had taken up land, were well versed in modern agriculture, and took seriously the business of voting and otherwise interacting with the newcomer society around them." (J.A. at 525.) Gulig found that it was the notion of general removal that the Chippewa Indians feared, and, to combat this fear, they sought not merely reservations, but individual property ownership. The Chippewa Indians, in Gulig's opinion, were eager to take on individual allotments pursuant to the 1854 Treaty; indeed, the "most significant challenge to the administration of the allotment provision of the 1854 Treaty, as it turned out, was that the land was not surveyed and allotted to them quickly enough." (J.A. at 553-54.) From the findings that the Chippewa Indians sought individual allotments, Gulig concluded, "[I]t is clear that the Chippewas of Lake Superior . . . knew the economic value and liability of the land they sought to acquire both as reservations and as individual allotments." (J.A. at 555.) Defendants also presented the expert opinion and report of Dr. Emily Greenwald ("Greenwald"), who opined that, at the very latest, the Chippewa Indians knew in 1919 that the land they held individually could be taxed. Greenwald, however, admitted that "[i]t is not clear whether [the Chippewa Indians] knew that their lands became taxable when title was conveyed" when they signed the 1854 Treaty. (J.A. at 607.)

In our view, the language of Article 11 of the 1854 Treaty is ambiguous. It is unclear whether the provision precluded all forms of involuntary alienation, including the sale of lands in satisfaction of tax liabilities, or only the general removal of the Chippewa Indians from the reservation area. As made amply clear by Supreme Court precedent, this Court must read this ambiguity in favor of Plaintiff and its members, and against the backdrop of the Indian sovereignty doctrine and the notion that American Indian tribes enjoy quasi-sovereignty. This backdrop reinforces Plaintiff's interpretation that the treaty disallowed

involuntary state tax sales, and thus state taxation, of real property held by Plaintiff or its members. Moreover, this Court must read the 1854 Treaty in favor of one inference if such inference supports the purpose of the treaty and the opposing inference subverts such purpose. *Winters*, 207 U.S. at 576-77. In this case, the purpose of the 1854 Treaty was to provide a permanent home for the Chippewa Indians, a purpose that would be weakened by the interpretation of Defendants through the sanctioning of involuntary alienation of land held by Plaintiff or its members through tax sales. Even setting aside these canons of treaty construction, which are a matter of law and thus support the district court's grant of summary judgment, Plaintiff's interpretation is much more persuasive. As the district court stated: "It defies logic to believe that the Indians would have signed a treaty ceding over seven million acres to the United States, knowing that they could lose the land they kept as a reservation the following year, due to non-payment of taxes." (J.A. at 637.) We agree with Cleland that the Chippewa Indians did not know nor did they have reason to know that, in setting aside a permanent reservation for them, the 1854 Treaty also required the Chippewa Indians to pay taxes each year on allotted land, with the potential of losing those allotted lands.

Defendants' experts provide opinions that we do not find persuasive in the present context. Gulig's report focuses primarily on the desire of Chippewa Indians to own land individually to prevent removal and to join the larger societies of the state and the United States. Assuming this view to be accurate, Gulig's report says little as to whether Chippewa Indians understood that, under the 1854 Treaty, individual allotment and ownership came with the price tag of state taxation. Gulig's report makes clear that the Chippewa Indians sought individual allotments for the benefits such allotments provided, but it does not contain a single piece of evidence that demonstrates that the Chippewa Indians knew that lands allotted under the 1854 Treaty would be subject to taxation and the attendant possibility of involuntary alienation. Gulig relies heavily on the fact that Michigan allowed those American Indians whom the state considered "civilized" to vote in state elections,

and the fact that "Indians wanted to participate as citizens of the state, and taxation was an important part of that citizen participation." (J.A. at 531-32.) Besides this unsupported conclusory assertion, Gulig hardly even mentions taxation. Greenwald readily admitted in her report that it was "unclear" whether the Chippewa Indians knew of the tax liabilities of land ownership; she only concluded that by 1919, the Chippewa Indians knew that individually held property was subject to taxation. As noted by the district court, "this conclusion does not enlighten the Court as to what the Indians may have believed at the time the Treaty was signed" and is therefore of little use in interpreting the 1854 Treaty. (J.A. at 634-35 n.4.)

In their brief to this Court, Defendants make two arguments. First, Defendants argue that Plaintiff's interpretation of the 1854 Treaty cannot stand, as it would create a system of "perpetual tutelage" and would be contrary to a purpose of the 1854 Treaty to "civilize" the Chippewa Indians. (Defs. Br. 39.) We disagree. Plaintiff's interpretation merely disallows involuntary alienation; any voluntary form of alienation, assuming the President has allowed such alienation under Article 3 of the treaty, would be permissible. Moreover, as Defendants readily admit, the point of restrictions on alienation of the land was to encourage the "civilizing" of the Chippewa Indians, as there was a "concern that the Native Americans would lose control of the land and thereby end the 'civilization' process." (Defs. Br. 39 n.88.) Thus, Plaintiff's interpretation is more in line with the purpose of "civilizing" the Chippewa Indians by ensuring that they would maintain control of the land by shielding that land from involuntary alienation such as a tax sale.

Second, Defendants argue that, before a tax sale of allotted land could take place, an allotment in fee simple would have to be made, and such allotment was subject to a series of procedures and safeguards, such as ensuring that the allottee was competent to manage the land. This argument is irrelevant. Whether there was procedure in place to ensure an allottee was responsible before an unrestricted allotment took place simply has

no bearing as to whether the Chippewa Indians understood that an allotment was coupled with taxation.

The point is that while Plaintiff's and Defendant's interpretations represent competing inferences from ambiguous language in Article 11 of the 1854 Treaty, Plaintiff's interpretation is far more compelling. The Chippewa Indians envisioned land set aside for them permanently; it simply does not make sense that the Chippewa Indians would disapprove of the mass removal of their society but would sanction a gradual removal of individuals through involuntary alienation. As Cleland notes, this is especially true considering that the Chippewa Indians did not have much hard currency to pay annual property taxes. Like the treaty at issue in *The Kansas Indians*, "The object of the treaty was to hedge the lands around with guards and restrictions, so as to preserve them for the permanent homes of the Indians. In order to accomplish this object, they must be relieved from every species of levy, sale, and forfeiture–from a levy and sale for taxes, as well as the ordinary judicial levy and sale." 72 U.S. (5 Wall.) at 760-61. Likewise, in order to accomplish the object of the 1854 Treaty, the preservation of a permanent home for the Chippewa Indians, Plaintiff and its members must be relieved of every species of involuntary removal, including a levy and sale for taxes. As a matter of law, the district court was required to read the ambiguous language of the 1854 Treaty in favor of Plaintiff, a decision that was also practically sound.

## B. ABSENCE OF CLEAR CONGRESSIONAL INTENT TO ALLOW TAXATION

### 1. Standard of Review

This Court reviews the district court's decision on a motion for summary judgment *de novo*. *Turner*, 412 F.3d at 637 (citation omitted). The moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the facts and all of the inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (citation omitted).

**2. Analysis**

The district court did not err in granting summary judgment in favor of Plaintiff on the ground that Congress has not expressed a clear intent to make alienable the property held in fee simple by Plaintiff or its members within the reservation.

**a. Legal Framework**

While the 1854 Treaty is properly interpreted as preventing the involuntary alienation of, and thus the taxation of, reservation lands held in fee simple by Plaintiff or its members, Congress may abrogate treaty rights; Congress must, however, clearly express its intent to do so. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202 (citing *United States v. Dion*, 476 U.S. 734, 738-40 (1986)). "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Id.* at 202-03 (quoting *Dion*, 476 U.S. at 740).

Independent of Congress' power to abrogate American Indian treaty rights, Congress may allow state taxation of American Indian reservation lands, but only if it expresses its clear intention to do so. The seminal case of permitted state taxation of American Indian reservation lands is *Goudy v. Meath*, 203 U.S. 146 (1906). The plaintiff, a Puyallup Indian, claimed that certain property allotted to him under treaty was exempt from state taxation. *Id.* at 146. The treaty stated that any land allotted under the treaty was exempt from levy, sale, or forfeiture until the formation of a state constitution and the removal of the land restrictions by the state legislature. *Id.* at 147. The treaty went on to say that a state legislature could not remove the land

restrictions without the consent of Congress. *Id.* Under the treaty, the plaintiff was allotted certain property in 1886. In 1887, Congress enacted the Indian General Allotment Act, also known as the Dawes Act, 24 Stat. 388. The Dawes Act was legislation that allowed the President to allot reservation lands to individual American Indians. Section 5 of the Dawes Act stated that land allotted to American Indians was freely alienable, after the United States held such allotted land in trust for the allottees for twenty-five years.[2] In 1889, the state of Washington joined the United States, and that same year the state legislature passed a law that lifted the land restrictions in the treaty. *Id.* In 1893, Congress passed legislation, 27 Stat. 612, that allowed the alienability of land allotted to Puyallup Indians ten years after the passage of that legislation.[3] *Id.* The plaintiff recognized that Congress had made his allotment freely alienable; however, he argued that Congress had also not expressly repealed the provision in the treaty that protected his allotment from levy, sale, or forfeiture, so that his allotment was not taxable. *Id.* at 148-49.

The Supreme Court held that the plaintiff's allotment was subject to state taxation. The Court found that while Congress could provide that real property was subject to voluntary alienation but immune from involuntary alienation, Congress' "intent to do so should be clearly manifested." *Id.* at 149. The Court reasoned that from a general perspective, "it would seem strange to withdraw this protection [against voluntary alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation." *Id.*

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[2] Although the *Goudy* Court did not specify its reliance on Section 5 of the Dawes Act in its decision, the Supreme Court later interpreted *Goudy* as having rested primarily on that section. *See County of Yakima v. Confederate Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 263-64 (1992).

[3] This legislation effectively cut short the time frame in which the Puyallup Indians could not sell their allotted lands. Under the Dawes Act, the allottee would have to wait twenty-five years after the allotment to be free from restrictions on alienation, whereas under the 1893 legislation, the allottee would have to wait only until 1903.

In *McClanahan*, discussed above, the Court, in addition to discussing treaty construction, also addressed congressional approval of state taxation of American Indians and their property on a reservation:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of *express authority* conferred upon the State by *act of Congress*.

411 U.S. at 170-71 (internal quotation marks and citation omitted) (emphasis supplied).

In *Yakima*, the Supreme Court addressed congressional approval of state taxation of reservation land held by American Indians under the Dawes Act and the Burke Act of 1906, 34 Stat. 182. The Dawes Act, passed in 1887, "empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved." 502 U.S. at 254. As explained, *supra*, Section 5 of the Dawes Act required that each allotted parcel be held in trust by the United States for twenty-five years, after which the parcel would be free from restrictions on alienation. *Id.* Section 6 of the Dawes Act stated that each individual who was the recipient of an allotment had the benefit of and was subject to the laws of state in which he resided. *Id.*

In 1905, in the case of *In re Heff*, 197 U.S. 488 (1905), the Supreme Court held that Section 6 of the Dawes Act created plenary state jurisdiction immediately upon the issuance of the allotment, as opposed to the expiration of the twenty-five year trust period. *Id.* at 255. In response, Congress enacted the Burke Act, which stated that state jurisdiction would lie after the expiration of the twenty-five year trust period. *Id.* The Burke Act also contained a proviso that allowed the President to issue a patent in fee simple prior to the expiration of the trust period if the President found the

allottee to be competent and able to manage her own affairs. *Id.* "Upon such a premature patenting," the Burke Act stated that "all restrictions as to sale, incumbrance, or taxation of said land" were to be removed. *Id.* (quoting 34 Stat. 183) (internal quotation marks omitted).

The *Yakima* plaintiff was an American Indian tribe, who, along with its members, held in fee simple lands that were allotted under the Dawes Act and the Burke Act. *Id.* at 256. The plaintiff filed an action in district court seeking a declaratory judgment that such lands were exempt from state *ad valorem* taxation. The Supreme Court disagreed and found that the lands were subject to the state real property tax. The Court first noted that "the power to tax involves the power to destroy," as observed by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). *Id.* at 258. As such,

> [a]bsent cession of jurisdiction, or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians. . . . And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear.

*Id.* (internal quotation marks and citations omitted). The Court found such clear congressional intent in Section 5 of the Dawes Act, where Congress allowed lands allotted under the Dawes Act to be free of restrictions on alienation after the elapse of the trust period. *Id.* at 263. "[W]hen § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Id.* at 263-64. The Court also found that the Burke Act represented a clear intention by Congress that the allotted land be subject to taxation after the trust period, as that was made explicit in the proviso allowing the President to remove restrictions prior to the lapse of twenty-five years. *Id.* at 264.

In *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), the Supreme Court examined the allotment

of land under the Nelson Act of 1889. The Nelson Act distributed reservation land in three different ways. *Id.* at 108. Under Section 3, the United States allotted parcels to individual tribe members as provided for under the Dawes Act. *Id.* Under Sections 4 and 5, the United States sold "pine lands" to the highest bidder. *Id.* Under Section 6, the United States sold the remainder of the reservation land to non-Indian settlers. *Id.* The plaintiff American Indian band had purchased lands distributed under Sections 4, 5, and 6 to reestablish its land base. *Id.* The state taxation of these lands was before the Supreme Court. *Id.* at 110.

The Court found that the lands were subject to state taxation. Echoing its analysis in *Yakima*, the Court stated that "when Congress makes reservation lands freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local governments, unless a contrary intent is 'clearly manifested.'" *Id.* at 113 (quoting *Yakima*, 502 U.S. at 263). The Court held that the Nelson Act provided for the public sale of the lands in question, so Congress made those lands freely alienable; as a result, those lands were also subject to taxation. *Id.* The Court rejected the plaintiff's argument that when the plaintiff reacquired the lands, the lands became nontaxable. *Id.* at 114. The Court found that once Congress expressed a clear intent to make the land taxable, Congress must then express a clear intent to make the land nontaxable. *Id.* Moreover, the Court found that the plaintiff's position would render superfluous a federal statute that allowed the federal government to hold reservation lands in trust so that such land would be nontaxable; Congress had already provided an explicit route for the plaintiff to seek shelter from state taxation. *Id.*

**b. Application to This Case**

**i. The 1854 Treaty**

The Indian sovereignty doctrine serves as a backdrop not only for treaty interpretation but also statutory interpretation as well:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides *a backdrop against which the applicable treaties and federal statutes must be read.* It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.

*McClanahan*, 411 U.S. at 172 (emphasis supplied). This backdrop reinforces the requirement that Congress must make its intent to allow state taxation of reservation lands "unmistakably clear." *Yakima*, 502 U.S. at 258 (internal quotation marks and citation omitted). Specifically, "[a]bsent cession of jurisdiction, or other *federal statutes* permitting it, we have held, a State is without power to tax reservation lands and reservation Indians." *Id.* (internal quotation marks and citation omitted) (emphasis supplied). In *McClanahan*, the Court stated: "Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of *express authority* conferred upon the State by *act of Congress*." 411 U.S. at 171 (internal quotation marks and citation omitted) (emphasis supplied).

Defendants argue that the 1854 Treaty is sufficient to demonstrate the clear congressional intent necessary to allow state taxation of reservation lands. We disagree. A treaty is not a federal statute or an act of Congress. In our view, Congress makes its intent to allow state taxation of reservation lands unmistakably clear when it passes a statute to that effect. It is no coincidence that the Supreme Court used phrases such as "federal statutes" and "act of Congress" in describing what would be necessary for the Court to deem state taxation of reservation lands permissible. A treaty simply does not embody this clear congressional intent, as a treaty's ratification only involves the Senate, and thus does not have the same bicameral hurdles of an act of Congress. Defendants argue that because a treaty, under United States law, is self-executing and is the law of the land, it is the equivalent of an act of the legislature. We agree that the *effect*

of a treaty has legal import, as does the effect of an act of legislation; however, the mere fact that a treaty has legal force does not mean it is an act of Congress. All of the cases to which Defendants cite stand only for the proposition that, under United States law, a treaty is self-executing and does not require additional legislation to take effect. *See, e.g., Foster v. Neilson*, 27 U.S. 253, 314 (1829), *overruled on other grounds by United States v. Percheman*, 32 U.S. 51 (1833). While this is true, this does not mean a treaty is in fact an act of Congress representing that body's will. Concededly, legal authority may be derived from sources other than Congress, but the fact that a treaty has certain legal import is insufficient to establish that a treaty is an act of Congress that represents its will.

Defendants cite two cases of sister circuits where those courts found certain allotted lands, made alienable through treaty, to be taxable by the state. Neither of those cases, however, stand for the proposition that a treaty represents the clear intent of Congress. In *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), the Ninth Circuit relied solely on the alienable character of the allotted land to find that such land was taxable. Indeed, the Ninth Circuit recognized that a treaty did *not* represent clear congressional intent:

> The logic propounded by the *Goudy* Court and approved by *Yakima Nation* requires an Indian, even though he receives his property by treaty, to accept the burdens as well as the benefits of land ownership. *This proposition may be hard to square with the requirement, recently approved by the* Yakima Nation *Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear.* The strength of the language in *Yakima Nation*, however, makes virtually inescapable the conclusion that the Lummi land is taxable if it is alienable.

*Id.* at 1358 (emphasis supplied). Thus, the Ninth Circuit rested its analysis on the notion that alienability equals taxability, regardless of the source of that alienability; it explicitly found

that a treaty was not an expression of clear congressional intent.[4]

Likewise, *Thompson v. County of Franklin*, 314 F.3d 79 (2d Cir. 2002), does not stand for the proposition that a treaty represents clear congressional intent. In that case, the lead opinion (there was no majority opinion) found that the land in question was freely alienable, although it did not explain from where this alienability derived. The lead opinion then found clear congressional intent to make the land alienable under the Indian Nonintercourse Act of 1790, ("INA"), 25 U.S.C. § 177. *Id.* at 82. The INA states: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." The lead opinion found that the INA also stood for the fact that a conveyance made by treaty was valid, such that any property properly conveyed would also be subject to taxation.[5] *Id.* at 82-83. Nowhere in the lead opinion, or any of

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[4] We disagree with the holding of the *Lummi* decision. No Supreme Court case has stated that alienability equals taxability. As noted by the *Lummi* dissent, "[t]he Supreme Court in *Yakima Indian Nation* did not ignore how the land was allotted; the method of land allotment is crucial in federal Indian law." *Id.* at 1360 (Beezer, J., dissenting). Indeed, in *Cass County*, the dissent in the court of appeals opinion was of the view that "alienability allows taxation." 524 U.S. at 110 (internal quotation marks and citation omitted). Despite the fact that this argument was before the Supreme Court, the Court did not base its decision on this ground; instead, the Court reaffirmed the principle that *Congress* must make clear its intent to allow state taxation of reservation lands, and it had done so with the Nelson Act. *Id.* at 113.

[5] We also disagree with the analysis of the lead opinion. The INA differs from the other statutes that the Supreme Court has validated as expressing the clear congressional intent of alienability, in that the INA is not the source of the alienable character of the property. For example, under the Nelson Act, the alienability of the lands at issue derived from the Nelson Act itself, because the Act provided for the public sale of certain lands. As the dissent viewed the situation, "the issue seems to me not whether Thompson's land is freely alienable, but whether it is freely alienable *because* of an act of Congress." *Id.* at 95 (Sack, dissenting) (emphasis supplied). Suppose, for example, that a treaty empowered the President to allot reservation lands without restrictions on alienation. In such a case, an allotment would be freely alienable not because of an act of Congress, but because of the act of the President as empowered by the treaty. The mere fact that the conveyance of such an

the opinions, for that matter, did the court assert that a treaty is an expression of clear congressional intent. The 1854 Treaty is not sufficient to demonstrate a clear congressional intent that the lands at issue in this case be alienable and thus taxable.

### ii. The Statutes

Defendants argue that certain statutes demonstrate a clear congressional intent that the lands at issue in this case be alienable. We categorically disagree. Defendants first assert that the 1854 Act, 10 Stat. 598, evidences such clear congressional intent. The 1854 Act authorized the President to negotiate with the Chippewa Indians with respect to certain lands in Minnesota and Wisconsin. Defendants did not raise this argument before the district court, so they may not raise this argument before this Court. *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 549 (6th Cir.

1995) ("[T]his court will not consider issues not presented to the district court but raised for the first time on appeal."). In fact, Defendants argued in district court that the 1854 Act was inapplicable to the case at hand. Defendants cannot now reverse course and assert the 1854 Act is applicable to this case. Defendants next rely on the Dawes Act to show a clear congressional intent that the lands at issue be alienable. The record, however, contains absolutely no evidence that L'Anse reservation land was ever allotted under the Dawes Act. Indeed, although all three experts, Cleland, Gulig, and Greenwald, agreed that reservation land was allotted pursuant to the 1854 Treaty, none of the experts claimed that reservation land was allotted pursuant to any other law. Greenwald opined that the Office of Indian Affairs allotted land under the 1854 Treaty utilizing the

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allotment would pass muster under the INA does not answer the question of whether Congress has made clear its intent that the land be alienable. A key point is that the INA speaks to the conveyance of property, whereas statutes such as the Dawes Act and the Nelson Act speak to the nature of property. In short, congressional approval of the conveyance of alienable property does not necessarily evidence a clear congressional intent that such property be alienable in the first place.

same procedures as the Dawes Act, but Greenwald never claimed that the Dawes Act ever supplanted the 1854 Treaty as the source of power from which the allotments derived. Likewise, Defendants' reliance on certain acts passed in 1910 and 1913 is misplaced. Those acts, 36 Stat. 855 and 37 Stat. 678, provided that if an allottee died before the trust period expired, the Secretary of the Interior could issue the land in fee simple to the heirs if he found the heirs to be competent. We agree that lands so issued would be taxable, as Congress clearly expressed its intent that such lands were to be held in fee simple and thus would be alienable. The problem, however, is that Defendants muster not even a scintilla of evidence demonstrating that any of the land at issue was indeed issued under either of the acts. In fact, it was impossible for any of the land at issue to have been issued under the 1913 Act, at the least, because Defendant's own expert found that all of the land on the L'Anse reservation had been allotted by 1912.

Defendant's reliance on an act passed in 1922, 42 Stat. 994, is similarly flawed. That act provided that the Secretary of the Interior could allot reservation lands under treaties where the President had such power. In other words, the act made clear that the Secretary of the Interior could exercise presidential power with respect to allotments under treaties. We first note that land within the L'Anse reservation could not have been allotted under the 1922 Act, as all of the land within the reservation had already been allotted by 1912. This fact is dispositive of this argument. Furthermore, we agree with the district court that the 1922 Act was not so much congressional approval of alienability of lands allotted by the Secretary of Interior so much as it was a clarification as to the delegation of the President's power: "[T]he statute appears to be more of an 'administrative housekeeping measure,' than an act that was intended to abrogate or change the rights under the 1854 Treaty or address the alienability of such land." (J.A. at 639.)

The record demonstrates that the lands within the L'Anse reservation were allotted pursuant to the 1854 Treaty and not the Dawes Act, the 1854 Act, the 1910 Act, the 1913 Act, nor the

1922 Act. Defendants failed to demonstrate a clear congressional intent that the lands allotted on the L'Anse reservation be alienable and thus taxable.

We realize that the case turns on the formality of whether land was allotted and made alienable through an act of Congress or through some other source, such as the President. Supreme Court jurisprudence makes clear, however, that only Congress has the power to authorize state taxation of American Indian reservation land. If land becomes alienable through the clear intent of Congress, as manifested by statute, such land is also taxable. If land becomes alienable through another source, Congress simply has not spoken as to whether that land should be taxable.

## III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the order of the district court.

## DISSENT

RALPH B. GUY, JR., dissenting. The court has accurately set forth the facts and procedural history of this case. The result reached is certainly plausible. Nonetheless, I believe the approach taken by the Ninth Circuit in *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), is the better one. In *Lummi* the court held:

> A state cannot tax reservation lands or reservation Indians unless Congress has "made its intention to [authorize state taxation] unmistakably clear." [*County of Yakima v. Confederate Tribes and Banks of the Yakima Indian* Nation, 502 U.S. 251, 258 (1992)], 112 S.Ct. at 688 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765, 105 S.Ct. 2399, 2402, 85 L.Ed.2d 753 (1985)). In *Yakima Nation*, the Court found an unmistakably clear intent to tax fee-patented land. It did not rely on section 6 of the General Allotment Act as Yakima County proposed, concluding instead that the land's alienable status determines its taxability. *See* [*Yakima*] at [257-265], 112 S.Ct. at 688-691. The Court made no distinction between fee land allotted by treaty and that allotted under the Act. Its interpretation of section 5 of the Act and the proviso to section 6 imply that no matter how the land became patented, it is taxable once restraints against alienation expire.

*Id.* at 1357 (first alteration in original) (footnote omitted).

The court went on to say:

> The logic propounded by the *Goudy* Court [*Goudy v. Meath*, 203 U.S. 146 (1906)] and approved by *Yakima Nation* requires an Indian, even though he receives his

> property by treaty, to accept the burdens as well as the benefits of land ownership. This proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear. The strength of the language in *Yakima Nation*, however, makes virtually inescapable the conclusion that the Lummi land is taxable if it is alienable.

*Id.* at 1358.

There was a dissent in *Lummi* and the dissenting judge stated: "There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future." *Id.* at 1360. I have no quarrel with this observation, but I cannot find in the Treaty anything from which I can reasonably conclude that once this land became freely alienable, it should escape taxation. Without meaning to demean in any way the credentials of the experts who testified, I do not believe that any expert can tell you what was in the mind of an Indian 150 years ago relative to losing his land through forfeiture for nonpayment of taxes, when the tribe knew nothing of taxation and the consequences that might flow from failure to pay taxes that were assessed. I do not find the treaty language ambiguous. For me it is clear that, in a historical context, what was referenced when "removal" was mentioned was relocation of the tribe, and it had nothing to do with what might happen when freely alienable land was under individual ownership.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEWEENAW BAY INDIAN COMMUNITY, on its own behalf and as *parens patriae* for its members,

Plaintiff,

v.

ROBERT NAFTALY, et al,

Defendants.
_____/

Case No. 2:03-cv-170
Honorable David W. McKeague

**OPINION**

Plaintiff, the Keweenaw Bay Indian Community ("KBIC"), brings this action against Robert Naftaly, chairperson of the Michigan State Tax Commission, Robert Lupi, member of the Michigan State Tax Commission, Doug Roberts, member of the Michigan State Tax Commission, Dennis Platte, Executive Secretary of the Michigan State Tax Commission, L' Anse Township, Baraga Township, and Matthew Arko, Assessor of L' Anse and Baraga Townships. Plaintiff seeks declaratory relief prohibiting the collection of the State of Michigan's ad valorem property tax on lands held in fee simple by KBIC or its members.[6] Pending before this Court are defendants' and plaintiff's motions for summary judgment. Having duly considered the parties'

[6] Plaintiff initially sought injunctive relief, but, as the Court previously noted in its Sept. 27, 2004 Opinion denying defendants' motion to dismiss, the parties reached a stipulation as to the issues involved in that motion and the Court need not address it further.

briefs, arguments and exhibits, for the reasons that follow, the Court will deny defendants' motion for summary judgment and grant plaintiff's motion for summary judgment.

## I. FACTS

The Court has already set forth many of the facts applicable to the instant motion in its September 27, 2004 Opinion denying defendants' motion to dismiss and incorporates such facts by reference.[7] In addition, the Court notes that the following facts are relevant to the resolution of the pending motions for summary judgment.

KBIC is a federally-recognized Indian tribal government organized and operating under a Constitution and by laws approved by the Secretary of the Interior on December 17, 1936, pursuant to the Indian Reorganization Act of 1934. 25 U.S.C. § 476. Pursuant to the Treaty with the Chippewa at La Pointe, Oct. 4, 1842, 7 Stat. 591 ("1842 Treaty"), the Chippewa of Lake Superior and the Mississippi ceded the western half of Michigan's Upper Peninsula as well as portions of northern Wisconsin to the United States.

Most of the Chippewa continued to live within the ceded area and Article II of the 1842 Treaty guaranteed them the right to hunt within the ceded territory until required to remove by the President. 1842 Treaty, 7 Stat. 591. By the late 1840's, due to United States surveys of the land in the area, the Chippewa became afraid that the President would force them to remove

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[7] The Court notes that some of the facts pertinent to this case were also found by the court in *Keweenaw Bay Indian Community v. Michigan*, 784 F. Supp. 418 (W.D. Mich. 1991); an earlier case interpreting the 1854 Treaty. In *Keweenaw Bay*, the court addressed the extent of the Reservation boundaries and held that the boundaries of the reservation followed the exterior lines of townships and fractional townships described in the treaty and did not exclude lands that had been sold or otherwise disposed of by the government before the effective date of the treaty establishing the reservation.

from their residences. In February 1850, President Zachary Taylor issued a removal order, but that order was later abandoned. The Chippewa sent letters to the President asking for the creation of permanent reservations and even adopted American-style names and clothing to convince the United States government of their advanced state of civilization and thus the lack of any need for removal. According to one Indian agent at the time, removal was "the great terror of [the Indians'] lives and I hazard nothing in saying they will sooner submit to extermination than comply with it." *Keweenaw Bay,* 784 F. Supp. 418 (quoting Henry C. Gilbert). By 1854, the United States, under the leadership of Indian Commissioner George Many Penny, abandoned the removal policy and substituted a policy of creating reservations for Indians near their existing habitations. Commissioner Many Penny instructed United States officials to negotiate a new treaty with the Chippewa for the cession of land in Minnesota and Wisconsin.

A treaty was eventually signed on September 30, 1854. KBIC is the successor-in-interest of the L' Anse and Ontonagon bands of Chippewa Indians, signatories to the Treaty with the Chippewa at La Pointe, September 30, 1854, 10 Stat. 1109, ("1854 Treaty"). The Indians desired permanent homes in their present locations and the 1854 Treaty satisfied this desire by creating permanent homes for them on reservations. *See United States v. Thomas,* 151 U.S. 577, 582, 14 S. Ct. 426, 38 L. Ed. 276 (1894) (1854 Treaty created "permanent reservations" for the Chippewa). Article II of the 1854 Treaty also provided that 80 acres be patented to each mixed blood Chippewa over twenty-one years of age. 1854 Treaty, 10 Stat. 1109. All land, sold or unsold, within the exterior boundaries of the Reservation as described in Article II of the 1854 Treaty, formed part of the KBIC reservation and constituted Indian Country within the meaning of 18 U.S.C. § 1151. *Keweenaw Bay,* 784 F. Supp. 418, 428.

Two other articles of the 1854 Treaty are important to the resolution of the instant motions. First, Article III provides in part that:

> . . . the President may, from time to time, at his discretion, cause the whole [reservation] to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefore to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of a family, or single person occupying the same, or in case of its abandonment by them.

1854 Treaty, 10 Stat. 1109. Second, Article XI provides that:

> All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L' Anse, La Pointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

*Id.* The Reservation Fee Lands at issue in this case consist of the sold lands that were at issue in *Keweenaw Bay,* 784 F. Supp. 418, 428, as well as lands that were allotted or intended for allotment to the Chippewa pursuant to Article III of the 1854 Treaty. The Reservation consists of 59,840 acres located near the villages of L' Anse and Baraga. 6,223 acres in the reservation are held in trust by the United States for the benefit of KBIC, 7,912 acres are allotments held by KBIC members with restrictions upon alienation, 2,987 acres are owned in fee simple by KBIC and 688 acres are owned in fee simple by KBIC members. Nonmembers of the Community own the remaining 42,030 acres within the Reservation. After the execution of the 1854 Treaty, pursuant to

Article III of the 1854 Treaty, the President assigned parcels of Reservation land to individual Chippewa Indians. The assignments at issue in this matter were made in the form of fee simple patents. Additionally when restrictions upon alienation were removed from certain restricted patents, such removal was done pursuant to the 1854 Treaty.

Defendants argue that they are entitled to summary judgment because Congress explicitly authorized the alienability of the land at issue in this case, and that the land is taxable under *Cass County, Minnesota, et al. v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103, 118 S.Ct. 1904, 141 L. Ed. 2d 90 (1998). Plaintiff argues that Congress has *not* authorized the alienability of the land at issue here, and further, that the unambiguous language of Article XI of the 1854 Treaty states that the Indians shall not be required, under any circumstances, to remove from the reservation. Plaintiff also asserts it is entitled to summary judgment because the land is not taxable under the reasoning expressed in *Cass County,* or an extension thereof.

## II. ANALYSIS

### A. Standard of Review

Summary judgment is proper if the non-moving party has failed to raise a genuine issue of material fact as to any element of the claim, and the moving party is thereby entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The facts must be construed most favorably to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The non-moving party must come forth with more than a "mere scintilla" of evidence to create a genuine issue of material fact. *Anderson,* 477 U.S. at 252, 106 S. Ct. 2505.

The party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. at 586, 106 S.Ct. 1348. Ultimately, this Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52, 106 S. Ct. 2505.

### B. The Community is Entitled to Summary Judgment on Counts I and II.

This case poses a legal question of whether the Supreme Court's decision in *Cass County,* 524 U.S. 103, 141 L. Ed. 2d 90, 118 S. Ct. 1904, should be extended to cases involving alienation of land that occurred pursuant to a treaty and without any Congressional statute authorizing such alienation. It also raises questions of whether Congress passed such a statute, and whether language included in the 1854 Treaty precludes taxation of the land at issue in this case.

In Count I of its complaint, KBIC claims that defendants cannot enforce the Michigan General Property Tax Act ("Act") against the Reservation Fee Lands because states and local governments are precluded from imposing taxes upon Indian-owned lands within an Indian reservation absent an unmistakably clear authorization by Congress. In Count II of its complaint, KBIC claims that defendants cannot enforce the Act against the Reservation Fee Lands because such enforcement would violate the provisions of the 1854 Treaty, that set apart the Reservation as a permanent home for KBIC and its members. The Court will first address the parties' arguments related to Count II, which involves interpreting the 1854 Treaty, and will then address those arguments related to Count I.

#### 1. Plaintiff is Entitled to Summary Judgement on Count II Because the 1854 Treaty Prohibits Involuntary Removal from the Reservation Lands.

Native American treaties must be liberally construed in favor of Native Americans. *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 676, 99 S.Ct. 3055, 61 L.Ed.2nd 823 (1979); *Antoine v. Washington,* 420 U.S. 194, 95 S. Ct. 944,43 L. Ed. 2d 129 (1975); *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 432,63 S. Ct. 672, 87 L.Ed. 877, 97 Ct Cl. 731 (1943). The Treaty is governed by the intent of the parties, which consist of the Indian tribal signatories and the United States Government. *Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 206, 143 L. Ed. 2d 270, 119 S. Ct. 1187.

Ambiguous words and phrases in Indian treaties have been resolved in favor of the Indians. *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89, 39 S. Ct. 40, 42, 63 L.Ed. 138, 4 Alaska Fed. 709 (1918); *Winters v. United States,* 207 U.S. 564, 576-77, 28 S. Ct. 207, 211-12, 52 L. Ed. 340 (1908); *Jones v. Meehan,* 175 U.S. 1, 11, 44 L. Ed. 49, 20 S. Ct. 1 (1899) (stating that an Indian treaty "must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."). This rule is particularly applicable if the language of a treaty supports two inferences, one favoring the Indians and one the Government. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt,* 700 F.2d 341, 350 (7th Cir. 1983) (citing *Winters,* 207 U.S. at 575-77, 28 S. Ct. 207) (stating that "it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them.").

The Supreme Court noted *Kansas Indians,* 72 U.S. 737, 760, 18 L. Ed. 667 (1866), that "taxes must be first levied, and they cannot be realized without the power of sale and forfeiture, in case of non-payment." Where federal law precludes the sale of land for taxes, it also precludes the taxes themselves. *See In re*

*New York Indians,* 72 U.S.761, 18 L. Ed. 708 (1866) (striking down a New York statute that imposed property taxes on an Indian reservation but purported to preserve the Indians' continued right to occupy such lands). Generally, tax exemptions are not to be presumed, and statutes conferring them are to be strictly construed, but the Supreme Court held that "the contrary is the rule to be applied to tax exemptions secured to the Indians between them and the national government." *Carpenter v. Shaw,* 280 U.S. 363, 366, 50 S. Ct. 121, 74 Led. 478 (1930).

The impetus for the 1854 Treaty was H.R. 293, 33d Cong., May 3, 1854, which contemplated that Chippewa heads of households would be granted eighty-acre parcels of land that would be exempt from taxation in return for cessions of Chippewa land in Minnesota and Wisconsin. The bill never made it out of committee, but a similar bill was passed in December of 1854. *See* Act of Dec. 19, 1854, 10 Stat. 598 (1854) bill states:

> Fourth. The laws of the United States and the Territory of Minnesota shall be extended over the Chippewa territory in Minnesota whenever the same may be ceded, and the same shall cease to be "Indian country," except that the lands reserved to said Indians, or other property owned by them, shall be exempt from taxation and execution. . .

Id. Both parties argue that this bill, passed shortly after the 1854 Treaty was signed, supports their interpretation of the "removal" language in Article XI.[8]

The legislative history of the Act indicates that there was some contemplation that the Act would apply to land in Michigan. *See* Cong. Globe, 33d Cong., 1st Sess. 1334 (May 30, 1854). A provision in the Congressional Globe notes that Senator

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[8] Indeed, the Supreme Court, in *Fee v. Brown,* 162 U.S. 602, 610, 16 S. Ct. 875, 40 L. Ed. 1086 (1896), stated, that although subsequent to the 1854 Treaty, the Treaty should be construed in light of the Act.

Sebastian, from the Committee on Indian affairs, addressed issues related to the Chippewa and states:

> He also, from the [Committee on Indian affairs], to whom was referred a petition of the Lutheran Synod of Missouri, Ohio, and other States, praying that a grant of land may be made to the head of every family of Chippewa Indians residing in Michigan, and an appropriation for the support of schools among said Indians, asked to be discharged from its further consideration, on the ground that the prayer of the petition will be attained in the contemplated treaty with the Chippewa Indians; which was agreed to.

Cong. Globe, 33d Cong., 1st Sess. 1335. The Act, as it was enacted, mentions nothing about land in Michigan.

The Dec. 19, 1854 Act does not dictate the outcome of this case. While there is some mention of Michigan land in the legislative history, Congress could have explicitly mentioned the Reservation land at issue here in the statute but chose not to. Furthermore, contrary to defendants' suggestion, the fact that Congress included language prohibiting taxation on the land in Minnesota and not Michigan does not resolve the issues presented here in their favor.

Several treaties signed between other Indian tribes and the United States near the time of the 1854 Treaty contained language that exempted reservation lands from levy, sale or forfeiture until the state legislature removed the restrictions and Congress passed a statute consenting thereto. *See* Treaty with the Oto & Missouri, Mar. 15, 1854, Art. 6, 10 Stat. 1038; Treaty with the Omaha, Mar. 16, 1854, Art. 6, 10 Stat. 1043; Treaty with the Miami, June 5, 1854, Art. 2, 10 Stat. 1093; Treaty with the Umpqua & Kalapuya, Nov. 29, 1854, Art. 5, 10 Stat. 1125; Treaty with the Chippewa at Washington, Feb. 22, 1855, Art. 2, 10 Stat. 1165. The treaty at issue in *Goudy v. Meath,* 203 U.S. 146, 27 S. Ct. 48, 51 L. Ed. 130 (1906)), contained a clause that specifically

contemplated the allotted land eventually becoming taxable. The treaty addressed in *Goudy* allowed the President to issue a patent for any allotted land, and stated that the land "shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a state constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the state shall remove the restrictions. " 203 U.S. 146, 51 L. Ed. 130, 27 S. Ct. 48. In *Voigt,* 700 F.2d at 364, the Seventh Circuit construed the same removal language as was included in the 1854 Treaty as creating a right not to be removed from land set apart for Indians except in cases of "misbehavior." Furthermore, in *Starr v. Long Jim,* 227 U.S. 613, 33 S. Ct. 358, 57 L. Ed. 670 (1913), the Court dealt with a treaty that included language that stated the Indians "shall not be required to remove to the Colville Reservation until Congress does make such an appropriation." While the parties to the 1854 Treaty could have included specific language in the treaty, stating that the Indians shall not be removed to a certain place, there is no such language in the 1854 Treaty. Similarly, there is no language in the 1854 Treaty at issue in this case that purports to make land taxable after the state legislature removes restrictions on levy sale and forfeiture.

Plaintiff argues that the removal language in Article XI of the 1854 Treaty applies to any removal whatsoever, and that the land is not taxable under *In re Kansas Indians,* 72 U.S. 737, 18 L. Ed. 667 and *In re New York Indians,* 72 U.S. 761, 18 L. Ed. 708. Defendants argue that the words "Indians" and "homes," as used in Article XI indicate the "communal nature of the right [not to be removed from the reservation lands.] "Def's Br. In Opp'n to Pl's Mot. Summ. J. at 12. The words "set apart" refer to Article I where the United States agreed to create the L' Anse reservation. *Id.* According to defendants, these words combined, mean that the United States will not force the Community to leave the reservation because of the removal order issued in 1850. *See* Dr. Anthony Gulig, *A history of the Chippewa Treaty of 1854 with Special Reference to the Chippewas' Understanding of the Treaty,*

*the Creation of Reservations, and Allotment Provision of the Treaty,* 24 & 44 (2004).[9]

Defendants argue that Dr. Charles Cleland's report (Plaintiff's expert) and congressional legislation passed after the 1854 Treaty was signed establishes that the removal language in the 1854 Treaty only applied to a forced removal to Minnesota. During the 1840's and 1850's the Chippewa were afraid of such removal. Dr. Charles E. Cleland, *A Treaty History Relating to Land Ownership and Taxation on the Keweenaw Bay Indian Reservation,* Sept. 27, 2004, 42, 63. (Pl's Ex. 2.) According to Dr. Cleland, "Article [XI] solemnly guarantees that the signatory band would never be required involuntary to leave or give up their reservations created by the treaty for any reason." Cleland Report at 69. There is no record that anyone attempted to explain taxation to the Indians or that they thought they would have to pay money each year to keep their homes. *Id.* at 104. Dr. Cleland further notes that the process of assessing tax liens on the reservation lands would be "fundamentally contrary to the purpose of the treaty, that is, to provide secure and permanent homes for the Ojibwe bands." *Id.* at 70.

The 1854 Treaty does not mention property taxes at all. Dr. Cleland notes that the Chippewa, in signing the 1854 Treaty, understood that they had acquired permanent reservations and "would not be forced to leave the reservations." Cleland report at 75 (citing Nichols, John. D. 1988 *Statement made by the Indians: A Bilingual Petition of the Chippewa of Lake Superior, 1864.* London: Ontario Center for Research and Teaching of Canadian Native Languages). Dr. Cleland further notes that the concept of

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[9] Defendants also rely on a report by Dr. Emily Greenwald, in support of their motion for summary judgment. *See* Dr. Emily Grreenwald, *The Administration of Indian Allotments at L 'Anse,* 9-19 (2004). The only conclusion that Dr. Greenwald reaches that arguably lends support to their claims is that "by 1919, if not earlier, Indians at L' Anse understood that their lands became taxable when restrictions were removed. "However, this conclusion does not enlighten the Court as to what the Indians may have believed at the time the Treaty was signed, and therefore, the Court assigns little weight to the conclusions reached in Dr. Greenwald's report.

taxation was foreign to the Indians and that if they had understood that they had to pay money each year in order to keep their homes, they would not have signed the treaty. *Id* at 108, 112.[10]

Whether interpreting the removal language based on its plain meaning or a liberal understanding of what the Indian signatories would have believed it meant in the 1850's, the result is the same. The "removal" language of Article XI is, at the very least, ambiguous as to its scope. The 1854 Treaty does not qualify, limit or condition the right against removal in any way. Even if the most pronounced fear of the Indians at the time of signing the 1854 Treaty was forced removal to Minnesota it also appears that the Indians contemplated the establishment of a permanent reservation. The removal language in the 1854 Treaty supports at least two inferences, one favoring the Indians, and one favoring the government. Following the established rules of Indian treaty interpretation, the Court cannot say that the Indian signatories to the 1854 Treaty would have contemplated the future sale of their lands due to non-payment of taxes. *See Mille*

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[10] Defendants' expert, Dr. Anthony G. Gulig, also prepared a report with reference to the 1854 Treaty. Dr. Anthony G. Gulig, *A History of the Chippewa Treaty of 1854 with Special Reference to the Chippewas' Understanding of the Treaty, the Creation of Reservations, and Allotment Provisions of the Treaty,* Dec. 5, 2004. Dr. Gulig reaches the conclusion that the Indians knew the "economic value and liability" of the reservation land and individual land they acquired through the 1854 Treaty. *Id.* Dr. Gulig also asserts that there was no need for special exemption from taxation in the 1854 Treaty because the Indians wanted to participate as citizens of the state and taxation was "an important part of that citizen participation."

While Dr. Gulig's conclusions conflicts with the conclusions of Dr. Cleland in some respects, the Court notes that Dr. Gulig's report focuses more on what was not in the 1854 Treaty than on the meaning of the "removal" language. The Court will not presume that the Indian signatories desired to subject themselves to the potential loss of their land through a tax sale simply because it was an "important part" of citizen participation, when all other indications point to the opposite conclusion.

*Lacs Band of Chippewa Indians,* 526 U.S. 172, 200, 143 L. Ed. 2d 270, 119 S. Ct. 1187; *Winters,* 207 U.S. at 575-77.

Defendants' interpretation of the 1854 Treaty is too narrow. It defies logic to believe that the Indians would have signed a treaty ceding over seven million acres to the United States, knowing that they could lose the land they kept as a reservation the following year, due to non-payment of taxes. Furthermore, under defendants' interpretation of the Treaty, each individual land owner could be dispossessed of his or her land without violating Article XI, as long as the entire community was not removed all at once. A liberal reading of the removal language in the 1854 Treaty, and giving the Indians the benefit of the assumption that they were not alert to exclude every inference which might defeat the declared purpose of the 1854 Treaty, *Winters v. United States,* 207 U.S. 564, 52 L. Ed. 340, 28 S. Ct. 207, leads the Court to the conclusion that the removal language must be construed more broadly than to prevent removal to Minnesota. Therefore, because the Court finds that the removal language in the 1854 Treaty includes removal due to a tax sale for non-payment of *ad valorem* property taxes, the land at issue here is not subject to the Act and plaintiff is entitled to summary judgment on Count II.

**2. Plaintiff is Entitled to Summary Judgement on Count I Because Congress has not Manifested an Unmistakably Clear Intent to Render Such Land Subject to State Taxation.**

Even assuming, *arguendo,* that the removal language in the 1854 Treaty should not be interpreted as plaintiff believes it should be, plaintiff is still entitled to summary judgment on Count I. Indian reservation land is generally exempt from state and local taxation absent cession of jurisdiction or other federal statute permitting it. *Cass County,* 524 U.S. 103, 110, 141 L. Ed. 2d 90, 118 S. Ct. 1904; *see e.g., County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251, 254, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992) (holding that the General Allotment Act ("GAA") permitted Yakima County to impose *ad valorem* taxes on reservation land patented

in fee under the GAA). In *Cass County,* the Supreme Court held that "when Congress makes reservation lands freely alienable, it is unmistakably clear that Congress intends that land to be taxable by state and local governments, unless a contrary intent is clearly manifested." *Cass County,* 524 U.S. at 113, 118 S. Ct. 1904 (the Nelson Act of 1889, 25 Stat. 642 (1889)); *Yakima,* 502 U.S. at 268, 112 S. Ct. 683 (the GAA of 1887, 24 Stat. 388 (1887)); *Goudy v. Meath,* 203 U.S. 146, 147, 27 S. Ct. 48, 51 L. Ed. 130 (1906) (Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 633 (1893)). None of the aforementioned Supreme Court decisions expressly apply to Indian reservation lands made alienable pursuant to a treaty, which is not an act of Congress, but rather, a contract between sovereign nations. *See Washington State Commercial Passenger Fishing Vessel Assoc.,* 443 U.S. 658, 675, 61 L. Ed. 2d 823, 99 S. Ct. 3055.

There is no dispute in this case that the land at issue here is in fact alienable.[11] There is a question, however, of whether Congress authorized, made or rendered such lands freely alienable. Defendants argue that Congress made the land alienable, and therefore taxable, under *Cass County,* when it stated:

> that wherever, in any law or treaty or in any patent issued to Indian allottees for land in severalty pursuant to such law or treaty, there appears a provision to the effect that the lands so allotted can not be alienated without the consent of the President of the United States, the Secretary of the Interior shall have full power and authority to consent to or approve of the alienation of such allotments.

Act of Sept. 21, 1922, 42 Stat. 991, 995 ("1922 Statute"). Defendants argue, when it passed the 1922 Statute, Congress

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[11] Plaintiff conceded this point at oral argument on January 31, 2005.

intended that there would be no question regarding titles for land properly allotted and alienated under the 1854 Treaty in the past or future and that the 1922 Statute shows the necessary congressional intent to make the land at issue here alienable and therefore taxable. See H.R. Rep. No. 67-637 at 11 (1922); S. Rep. 67-551 at 8-9.

While Congress can make Indian reservation land freely alienable, and therefore taxable under *Cass County,* it does not appear that Congress has done so with regard to the land at issue in this case. In both *Cass County* and *Yakima,* Congress made Indian Reservation land freely alienable by specifically addressing the reservation land at issue in each case. In *Cass County,* the Court noted that Congress addressed the alienability of reservation land at issue in sections five and six of the *Nelson Act* when it removed the land from federal protection. 524 U.S. 103, 141 L. Ed. 2d 90, 118 S.Ct. 1904; Nelson Act of 1889, 25 Stat. 642. In *Yakima,* the Court noted that the GAA and the Burke Act Proviso clearly manifested Congressional intent to allow taxation on the Yakima reservation lands because it expressly addressed the taxability of fee-patented land. 502 U.S. 251, 116 L. Ed. 2d 687, 112 S. Ct. 683; General Allotment Act, 24 Stat. 388; Burke Act Proviso, 34 Stat. 182, 25 U.S.C. § 349 (1906).

The 1922 Statute does not remove land from federal protection, make land alienable, allot Indian reservation land or address the taxability of any such lands. Instead, as plaintiff argues, the statute appears to be more of an "administrative housekeeping measure," than an act that was intended to abrogate or change rights under the 1854 Treaty or address the alienability of such land. The legislative history of the 1922 Statute confirms this point. See H.R. Rep. No. 67-637, at 11 (1922); S. Rep. No. 67-551, at 8-9 (noting that the bill serves to clarify title issues and confirm that the Secretary of the Interior had the authority to act for the President in these matters). A letter from the Secretary of the Interior, included in the legislative reports explains:

> It has been suggested, however, that abstracters and possibly others concerned in seeing that indefeasible titles are obtained prefer something more definite to which they can point as specific evidence of the authority now believed to exist in the Secretary of the Interior to remove the restrictions in those cases where the original law or treaty under which the allotments were made direct that alienation can not be had without the consent of the President.

*Id.* at 12; *Id.* at 9-10. Furthermore, a later opinion of the Solicitor General described the 1922 Statute as a clarification of the Secretary of the Interior's existing powers rather than a new grant of authority:

> The act of September 21, 1922 (42 Stat. 994, 995, 25 U.S.C. sec. 392), expressly authorized the Secretary of the Interior to permit the alienation of allotments which under any law or treaty could be alienated only with the consent of the President. But at least in this particular instance the legislative history establishes conclusively that the purpose of the statute was merely to allay the traditional anxiety of conveyancers.

58 Interior Dec. 499, 513 n. 25, 1943 WL 4350, (Pl's Ex. 11).

The 1922 Statute addressed the alienability of land to the extent that it addressed the authority of the Secretary of the Interior to act on behalf of the President. However, the words used in the statute have nothing to do with the alienability of the reservation land at issue in this case. Therefore, because defendants have not and it appears cannot show that there is a Congressional act that made the land at issue here freely

alienable, the Court finds that the land is not taxable under *Cass County.*[12]

Defendants further state that the 1854 Treaty became the supreme law of the land after the Senate advised and consented to the 1854 Treaty, *Foster v. Neilson,* 27 U.S. 253, 314-15, 7 L. Ed. 415 (1829), and that ratification of the 1854 Treaty showed the necessary "congressional" intent to make the lands alienable and therefore taxable.[13] Defendants assert that the ratification of the 1854 Treaty essentially amounted to an act of the legislature and manifested the requisite Congressional intent to make the land alienable and therefore taxable. The Supreme Court someday may hold that ratification of a treaty is equivalent to an Act of Congress, and that land allotted and alienated pursuant to a treaty, as opposed to an act of Congress is taxable. However, the Supreme Court has not embraced this proposition at this time. Anticipating the direction in which the Supreme Court will direct the law may indeed be an exciting proposition, but it is not the proper role for this Court. The Court, therefore, rejects defendants' argument that the principles announced in *Cass County* should be extended to this case, where there is no congressional act addressing the alienability of land allotted under the 1854 Treaty. The two legal questions presented by Count I are properly resolved in plaintiff's favor and lead the Court to the conclusion that the land at issue here is not taxable. Therefore, the Court finds that there are no genuine issues of material fact

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[12] The Court is well aware that Congress has the power to address the alienability of the land at issue in this case. If Congress had addressed the alienability of the Reservation lands at issue here, but not the taxability, the principle announced by the Supreme Court in *Cass County* would "fill in the blanks," so to speak, and dictate that the land be taxable (unless Congress manifests a clear intention to the contrary). Such is not the case here.

[13] Defendants argue that the Second Circuit's opinion in *Thompson v. County of Franklin,* 314 F.3d 79 (2d Cir. 2002), supports their position that land allotted under a treaty which became freely alienable is subject to state *ad valorem* taxation. Because the Court declines to extend *Cass County* to facts of this case, the Court finds the reasoning expressed in *Thompson,* a case without a majority opinion, unpersuasive.

and will grant summary judgment in plaintiff's favor on Count I as well.

## III. CONCLUSION

Applying the rules of Indian Treaty interpretation, following Supreme Court precedent as it stands today, and noting that the questions involved here essentially involve legal determinations, the Court finds that there are no genuine issues of material fact in this case, and plaintiff is entitled to Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 56.

An order consistent with this opinion shall issue forthwith.

Dated: May 27, 2005 /s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEWEENAW BAY INDIAN COMMUNITY, on its own behalf and as *parens patriae* for its members,

Plaintiff,

v.

ROBERT NAFTALY, et al,

Defendants.
_____/

Case No. 2:03-cv-170
Hon. David W. McKeague

**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

In accordance with the Court's Opinion of even date,

**IT IS HEREBY ORDERED** that defendants' motion for summary judgment is **DENIED.**

**IT IS FURTHER ORDERED** that plaintiff's motion for summary judgment is **GRANTED.**

**IT IS FURTHER ORDERED** that the Michigan General Property Tax Act is not valid as applied to the lands held in fee simple by the Keweenaw Bay Indian Community or its members within the exterior boundaries of the L'Anse Indian Reservation. Accordingly, defendants shall not enforce the Michigan General Property Tax Act against lands held in

fee simple by the Keweenaw Bay Indian Community or its members within the exterior boundaries of L'Anse Indian Reservation.

Dated: May 27, 2005

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-1952

KEWEENAW BAY INDIAN COMMUNITY,
Plaintiff-Appellee,

v.

ROBERT NAFTALY, et al,
Defendants-Appellants,

TOWNSHIP OF L'ANSE, et al.,
Defendants.

Before: GUY DAUGHTREY, and CLAY, Circuit Judges.

**JUDGMENT**

On Appeal from the United States District Court
for the Western District of Michigan at Marquette.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the order of the district court is AFFIRMED.

**ENTERED BY ORDER OF THE COURT**

Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-1952

KEWEENAW BAY INDIAN COMMUNITY,
Plaintiff-Appellee,

v.

ROBERT NAFTALY, et al,
Defendants-Appellants,

TOWNSHIP OF L'ANSE, et al.,
Defendants.

**MANDATE**

Pursuant to the court's disposition that was filed 6/26/06 the mandate for this case hereby issues today.

A True Copy.

COSTS: TO BE RECOVERED BY APPELLEE
Filing Fee .....$
Printing .....$87.24

Total .....$87.24

_____
Deputy Clerk

## TREATY WITH THE CHIPPEWA, 1854, September 30, 1854, 10 Stats. 1109, Ratified January 10, 1855, Proclaimed January 29, 1855

Article 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

* * *

Article 11. All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

No. 06-429

IN THE

# Supreme Court of the United States

ROBERT NAFTALY, *et al.*,

*Petitioners,*

v.

KEWEENAW BAY INDIAN COMMUNITY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

1. Did both courts below err in concluding that the 1854 Treaty with the Chippewa at La Pointe, in light of its unique language and history, precludes taxation of Indian lands allotted and made alienable under the treaty, and that Congress has never abrogated that treaty right?

2. Did both courts err in concluding that, as both parties had conceded, there were no genuine issues of material fact precluding resolution of this case on summary judgment?

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Questions Presented | i |
| Table of Contents | ii |
| Table of Cited Authorities | iii |
| Introduction | 1 |
| Treaty Provisions Involved | 1 |
| Statement | 1 |
| Reasons for Denying the Petition | 9 |
| Conclusion | 15 |
| Appendix — Treaty with the Chippewa, 1854 | 1a |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Air France v. Saks*, 470 U.S. 392 (1985) ..... 9

*Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) ... 4, 6, 10, 11, 12

*Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943) ..... 9

*County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) ..... 6, 10, 11

*Goudy v. Meath*, 203 U.S. 146 (1906) ..... 11, 12

*The Kansas Indians*, 72 U.S. 737 (1866) ..... 5

*Keweenaw Bay Indian Community v. Michigan*, 784 F. Supp. 418 (W.D. Mich. 1991) ..... 2, 3, 4, 5, 6

*Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994) ..... 7, 8, 9, 12, 13

*Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) ..... 10

*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) ..... 7, 9, 10

*Cited Authorities*

*Page*

*Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) ..... 10

*The New York Indians*, 72 U.S. 761 (1866) ..... 5

*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) ... 7, 10

**Statutes:**

18 U.S.C. § 1151 ..... 3

25 U.S.C. § 372 ..... 13

Burke Act, 34 Stat. 182 (1906) ..... 11

Act of Mar. 3, 1893, 27 Stat. 612 (1893) ..... 11

Nelson Act, 25 Stat. 642 (1889) ..... 11

General Allotment Act, 24 Stat. 388 (1887) .... 8, 11, 14

**Treaties:**

Treaty of Point Elliott (Treaty with the Dwamish, Suquamish *et al.*), Jan. 22, 1855, 12 Stat. 927 ... 12

Treaty with the Chippewa at La Pointe, Sept. 30, 1854, 10 Stat. 1109 (the "1854 Treaty") .....*passim*

1854 Treaty, art. 1 ..... 3

*Cited Authorities*

*Page*

1854 Treaty, art. 2 ..... 2

1854 Treaty, art. 3 ..... 3, 5

1854 Treaty, art. 11 ..... *passim*

Treaty with the Omaha, Mar. 16, 1854, 10 Stat. 1043 ..... 12

Treaty with the Chippewa at La Pointe, Oct. 4, 1842, 7 Stat. 591 (the "1842 Treaty") ..... 2

1842 Treaty, art. II ..... 2

**Other Authorities:**

<http://www.indianlandtenure.org/ILTFallotment/specinfo/specinfo.htm> (detailed charts available by clicking map) (visited Oct. 25, 2006) ..... 14

## INTRODUCTION

Petitioners argue that the decision below misapplies this Court's precedent, conflicts with a decision of the Ninth Circuit, and raises questions of general importance. On the contrary, both lower courts agreed on the interpretation of language and history unique to a single Indian treaty. Their decisions apply well-established legal principles, create no conflict with other courts, and involve the property tax status of a small part of a single reservation. There is no reason for further review.

## TREATY PROVISIONS INVOLVED

The text of the Treaty with the Chippewa at La Pointe, Sept. 30, 1854, 10 Stat. 1109 (the "1854 Treaty"), is set forth in the Appendix to this brief.

## STATEMENT

The court of appeals' holding that the State of Michigan cannot impose its *ad valorem* property tax on land owned in fee by the Keweenaw Bay Indian Community (the "Community") and its members within the L'Anse Reservation rests upon the court's interpretation of a unique 1854 treaty as it applies to land in one reservation. The Community, a federally recognized Indian tribe, is the successor in interest to the L'Anse band of Lake Superior Chippewa, for which the L'Anse Reservation was established. The fee land at issue encompasses approximately 6% of the 59,840-acre Reservation.[1]

1. The fee land consists of approximately 2,947 acres owned by the Community and approximately 688 acres owned by Community members. Affidavit of Susan LaFernier ¶ 6, R. 26, 6th Cir. App. 72, 74.

1. Pursuant to the Treaty with the Chippewa at La Pointe, Oct. 4, 1842, 7 Stat. 591 (the "1842 Treaty"), the Chippewa of Lake Superior and the Mississippi ceded the western half of Michigan's Upper Peninsula as well as portions of northern Wisconsin to the United States. *Keweenaw Bay Indian Community v. Michigan*, 784 F. Supp. 418, 421 (W.D. Mich. 1991). Most of the Chippewa continued to live and reside within the ceded area, however. Article II of the 1842 Treaty guaranteed to the Chippewa the right to hunt within the ceded area with the usual privileges of occupancy unless and until required to remove by the President, as well as the protection of the federal Indian trade and intercourse laws. *Id.* By the late 1840s the United States had surveyed and begun to sell land in the Keweenaw Bay area, causing fear among the Chippewa that they would be forced to remove from their residences and villages in the ceded area. *Id.* The Chippewa leaders sent numerous petitions and letters to the President and Indian agents asking for the creation of permanent reservations. *Id.* The local Indian agent remarked that removal was "'the great terror of [the Indians'] lives and I hazard nothing in saying they will sooner submit to extermination than comply with it.'" *Id.* "A consistent Indian theme throughout the period . . . prior to the 1854 Treaty was an ardent desire for permanent homes for the Indians in their present locations." *Id.* at 422.

As a result of the petitions and letters from the Chippewa, the United States agreed to negotiate another treaty with them in 1854. The 1854 Treaty created permanent homes for the Chippewa on reservations that encompassed their actual dwelling places. *Keweenaw*, 784 F. Supp. at 424. For the L'Anse and Vieux De Sert bands, the United States "agree[d] to set apart and withhold from sale" the lands that became known as the L'Anse Reservation. 1854 Treaty, art. 2. In

exchange for these reservations, the Chippewa ceded to the United States over seven million mineral-rich acres located in the Arrowhead region of present-day Minnesota, portions of which are known today as the Iron Range. 1854 Treaty, art. 1; *see also* Pet. App. 9a, 20a, 48a.

The court of appeals' decision rests primarily on Article 11 of the 1854 Treaty, which provides in pertinent part that "the Indians shall not be required to remove from the homes hereby set apart for them." 1854 Treaty, art. 11. Also relevant is Article 3, which provides the President with authority to make allotments of land to each head of a family or single person over twenty-one years of age and "at his discretion, . . . issue patents therefore to such occupants, with such restrictions of the power of alienation as he may see fit to impose." 1854 Treaty, art. 3. The record demonstrates – and Petitioners have conceded – that all of the allotments within the L'Anse Reservation were made, and that such allotted lands were made alienable, by the President or his delegates pursuant to the 1854 Treaty. Pet. 5; Pet. App. 32a-33a.

In 1991, in other litigation between the Community and the State of Michigan, the United States District Court for the Western District of Michigan held that all of the fee land within the exterior boundaries of the L'Anse Reservation formed part of the Community's Reservation and constituted "Indian country" within the meaning of 18 U.S.C. § 1151. *Keweenaw*, 784 F. Supp. 418. As the court noted, "Since earliest times, [the vicinity of L'Anse, Baraga, and the Keweenaw Bay] has been an uninterrupted residential community of Chippewa Indians whose identity has been well-known and frequently asserted." *Id.* at 428. The court held it would "def[y] common sense to conclude that Indians would seek a treaty to create a permanent home for

themselves and exclude the Indian villages and the property upon which many of their own residences were located." *Id.* at 424. The record in *Keweenaw* "was fully developed during eight days of trial," *id.* at 420, and the State did not pursue an appeal.

2. In 1994, pursuant to the terms of a stipulated consent judgment, the Community and the affected local governments resolved a dispute over the taxable status of fee land owned by the Community and its members within the L'Anse Reservation. The consent judgment acknowledged that all of the fee land owned by the Community and its members within the L'Anse Reservation was nontaxable, and the Community agreed to make (and made) payments in lieu of property taxes to the affected local governments for governmental services provided to the Community and its members. Pet. App. 12a.

In 1999, however, Petitioners or their predecessors, acting in their capacity as officials of the Michigan State Tax Commission, directed all local property tax officials throughout Michigan to place all real property owned by Indian tribes and their members on the tax assessment rolls, based on their reading of this Court's decision in *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). Pet. App. 12a. The Community subsequently brought this action against Petitioners and the assessing units of local government to prevent state taxation of the fee land owned by the Community and its members within the L'Anse Reservation. The Community based its complaint on several grounds, including that state taxation of the fee land was impermissible under the particular terms of the 1854 Treaty, and that in any event the taxation had not been authorized by Congress, either directly or by a statute making the land alienable, as required under *Cass County*.

After Petitioners had conducted written discovery and the parties had exchanged expert reports, Petitioners filed a motion for summary judgment contending that there were no genuine issues of material fact having a bearing on the taxability of the land at issue and that the Community's complaint should be dismissed. The Community filed a cross-motion for summary judgment. The district court held that the 1854 Treaty precluded state taxation. Considering the text of the Treaty, in particular the Article 11 provision that "the Indians shall not be required to remove from the homes hereby set apart for them," and its purpose to create permanent reservations for the Chippewa at the location of their existing homes, the court concluded that the State could not require the Indians to be removed from their homes for non-payment of property taxes, and hence (under this Court's precedents) the taxes themselves could not be imposed. Pet. App. 42a-43a, 45a-48a; *see, e.g.*, *The Kansas Indians*, 72 U.S. 737, 760 (1866) ("taxes must first be levied, and they cannot be realized without the power of sale and forfeiture, in case of non-payment); *The New York Indians*, 72 U.S. 761 (1866) (striking down New York statute that imposed property taxes on an Indian reservation but purported to preserve the Indians' continued right to occupy such lands).

The court also examined the thorough treatment of the historical record in the previous *Keweenaw* decision, as well as in the expert reports and briefs, and determined that there was no evidence that the signatories to the Treaty -- the Indian Tribes and the United States – intended by the allotment provision in Article 3 to negate the provisions of Article 11 and subject the allotted lands to state or local taxation upon the removal of alienation restrictions. Pet. App. 37a-40a, 45a-48a. Finally, the court applied the longstanding requirement that Indian treaties must be interpreted in the sense

in which they would naturally be understood by the Indians, with ambiguities resolved in the Indians' favor. Pet. App. 47a-48a. Echoing the previous *Keweenaw* decision, the court concluded that "[i]t defies logic to believe that the Indians would have signed a treaty ceding over seven million acres to the United States, knowing that they could lose the land they kept as a reservation the following year, due to non-payment of taxes." Pet. App. 48a.

The court also held that state taxation was precluded under the federal common law rule that "Indian reservation land is generally exempt from state and local taxation absent cession of jurisdiction or other federal statute[s] permitting it." Pet. App. 48a (citing *Cass County* and *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992)). The court noted that in *Cass County*, the Supreme Court held that "'when Congress makes reservation lands freely alienable, it is unmistakably clear that Congress intends that land to be taxable by state and local governments, unless a contrary intent is clearly manifested.'" Pet. App. 49a (quoting *Cass County*, 524 U.S. at 113). The district court then held that, unlike in *Cass County*, the land here was made alienable not by an Act of Congress but pursuant to the terms of the 1854 Treaty, which preserved tax immunity through the Article 11 non-removal provision. The court concluded that because Congress had not acted to override the Treaty and make the land taxable, either expressly or by making it freely alienable through a later congressional act, there was no congressional authorization to supersede otherwise applicable general principles and permit state taxation of Indian-owned reservation lands. Pet. App. 50a-53a.

3. The United States Court of Appeals for the Sixth Circuit affirmed. Pet. App. 1a-35a. The court recognized that

this Court's decisions interpreting Indian treaties from *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), to *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), require that treaty language must be evaluated in light of the history and context of the particular treaty at issue. Pet. App. 16a-17a. It concluded that the particular guarantee against removal in Article 11 of the 1854 Treaty precluded any involuntary alienation of Indian-owned property, including tax sales. Pet. App. 17a, 20a, 22a. Like the district court, the court of appeals held that: "The Chippewa Indians envisioned land set aside for them permanently; it simply does not make sense that the Chippewa Indians would disapprove of the mass removal of their society but would sanction a gradual removal of individuals through involuntary alienation." Pet. App. 22a. The court of appeals also noted that any ambiguity in an Indian treaty must be resolved in favor of the Indians. Pet. App. 16a-17a, 22a.

The court of appeals then addressed whether Congress had ever clearly expressed an intent to abrogate the Community's rights under Article 11 of the Treaty or had otherwise clearly authorized state taxation of the fee land at issue. Pet. App. 23a-28a. The court rejected Petitioners' contention that the alienation provisions of the 1854 Treaty itself demonstrated congressional intent to permit taxation sufficient to abrogate the negotiated, immunity-preserving terms of the Treaty. It explained that a treaty, while it has the force of law, is quite different from an Act of Congress. Pet. App. 28a-29a. The court also considered and rejected, Pet. App. 29a-30a, Petitioners' reliance on cases from other circuits, including the Ninth Circuit's decision in *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994), which

had permitted state taxation of land that was ultimately made alienable in accordance with the provisions of a different treaty and later congressional enactments. Moreover, the court explained that there was no basis for concluding that any land within the L'Anse Reservation had been allotted or made alienable under the General Allotment Act, 24 Stat. 388 (1887), or any other federal statute that might have evinced a clear congressional intent to override the Treaty and permit taxation. Accordingly, the court held that the Indian-owned lands within the Reservation were immune from state property tax, under both the 1854 Treaty and federal common law. Pet. App. 31a-33a.

In a brief dissent, Judge Guy noted that "[t]he court has accurately set forth the facts . . . [and t]he result reached is certainly plausible." Pet. App. 34a. He disagreed, however, with the majority's interpretation of the 1854 Treaty to include preservation of the tax immunity of allotted land that became freely alienable. Pet. App. 35a. He would instead have construed the treaty to have "nothing to do with what might happen when freely alienable land was under individual ownership." *Id.* In the absence of any treaty immunity, Judge Guy would have followed what he understood to have been the Ninth Circuit's approach in *Lummi* and held that even on the L'Anse Reservation the "alienable status" of reservation fee land, whatever its source, "determines its taxability." 5 F.3d at 1357.

Petitioners did not seek *en banc* review of the court of appeals' decision.

## REASONS FOR DENYING THE PETITION

The court of appeals' holding results from its straightforward application of this Court's longstanding and well-established precedents to the particular language and history of the 1854 Treaty and to land allotted and made alienable under that Treaty. The decision below does not conflict with this Court's cases or with the Ninth Circuit's decision in *Lummi* – in which the relevant treaty, unlike here, expressly contemplated potential alienation and forfeiture of allotted land in accordance with the specific consent of Congress, which was subsequently obtained. Nothing about the lower courts' application of settled legal principles to the unique facts of this case merits this Court's review.

1. A treaty is a negotiated agreement, the meaning of which is governed by the intentions and "shared expectations of the contracting parties." *Air France v. Saks*, 470 U.S. 392, 399 (1985); *accord Mille Lacs Band*, 526 U.S. at 206. Because each treaty is a unique agreement created in different factual circumstances by different parties, treaty language must be analyzed in light of the particular facts and circumstances surrounding its making in order to ascertain the intentions of the contracting parties. *Mille Lacs Band*, 526 U.S. at 202 ("[T]he State's argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction."); *Air France*, 470 U.S. at 400-03; *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). An Indian treaty, moreover, must be interpreted "to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs Band*, 526 U.S. at 196. Finally, Indian treaties must be construed liberally in favor of the Indians, with any

ambiguities resolved in their favor. *Id.* at 200; *Worcester*, 31 U.S. (6 Pet.) at 582 ("The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.").

Carefully applying these principles, both lower courts interpreted the 1854 Treaty to preclude state taxation of the land at issue based on the Treaty's unique language, purpose, negotiations, and historical context. Pet. App. 14a-22a, 42a-48a. There is nothing about the courts' application of settled law to construe a particular Indian treaty that would warrant review by this Court.

2. Contrary to the Petitioners' contention (Pet. 5-7), the court of appeals' holding is consistent with both the holding and the rationale of *Cass County*. There, the Court recited the well-established common-law rule that "[s]tate and local governments may not tax Indian reservation land absent cession of jurisdiction or other federal statutes permitting it." 524 U.S. at 110 (citing *County of Yakima*, 502 U.S. at 258, and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)) (internal quotations omitted). The Court also noted that it has "consistently declined to find that Congress has authorized such taxation unless it has made its intention to do so unmistakably clear." 524 U.S. at 110 (citing *County of Yakima*, 502 U.S. at 258, and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985)) (internal quotations omitted). The Court held that "[w]hen Congress [by statute] makes reservation lands freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state and local governments, unless a contrary intent is 'clearly manifested.'" 524 U.S. at 113 (quoting *County of Yakima*, 502 U.S. at 263).

As Petitioners acknowledge (Pet. 5), *Cass County* found the requisite "unmistakably clear" indication of congressional intent to override common-law Indian tax immunity in an Act of Congress, the Nelson Act, 25 Stat. 642 (1889), which authorized and effectuated the sale and alienation of Indian reservation land within Minnesota. 524 U.S. at 108, 113. The Court relied on two earlier decisions which also concerned the interpretation of congressional statutes that rendered Indian reservation land alienable, *County of Yakima*, 502 U.S. at 258 (involving the General Allotment Act and the Burke Act, 34 Stat. 182 (1906)), and *Goudy v. Meath*, 203 U.S. 146, 147 (1906) (involving the Act of Mar. 3, 1893, ch. 209, 27 Stat. 612, 633 (1893)). Each case addressed the intent of *Congress*, in enacting a statute making Indian reservation land alienable (or consenting to a state statute with that effect), to override otherwise applicable rules of immunity from state taxation. *E.g.*, *Cass County*, 524 U.S. at 106, 110, 113, 114, 115; *County of Yakima*, 502 U.S. at 258-59, 263-64, 267; *Goudy*, 203 U.S. at 147, 148, 149, 150.

The situation here is different. The lower courts construed the 1854 Treaty to assure the Indian parties their traditional tax immunity, even if land was allotted and became voluntarily alienable pursuant to the Treaty's terms. *Cass County* and its predecessors do not affect that interpretation. It makes no sense to argue that a treaty that preserved tax immunity (through its non-removal provision in Article 11) embodied, at the same time, an "unmistakably clear" intent to override that same immunity. The *Cass County* cases would be relevant in construing a later congressional Act that expressly modified a treaty or made reservation land alienable. Neither of those situations is present here. The court of appeals properly rejected Petitioners' attempt to identify any such later statute below

(Pet. App. 31a-33a), and Petitioners do not renew that attempt here. There is thus no basis for Petitioners' claim of a conflict with *Cass County*.[2]

3. There is likewise no conflict with the Ninth Circuit's decision in *Lummi*. The *Lummi* court described the issue before it in broad terms as involving the status of land "patented under a treaty," and concluded that the land in question in the case was "taxable if it is alienable." 5 F.3d at 1357, 1358. But the Treaty of Point Elliott at issue in *Lummi*, like the treaty before this Court in *Goudy v. Meath*, was "patterned after the Treaty with the Omahas," which permitted allotment, but provided that "restrictions on alienation would remain until the state legislature, *with Congressional consent*, removed them." *Lummi*, 5 F.3d at 1357-58 (emphasis added).[3] The fee land at issue in *Lummi* (like the land in *Goudy*) was thus made alienable pursuant

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2. Nothing in the court of appeals' decision questions "the accepted constitutional position of self-executing treaties . . . as law of the land." Pet. 6. To the contrary, the courts below construed the treaty and, finding no superseding congressional enactment, enforced it in accordance with its terms.

3. Article 7 of the Treaty of Point Elliott (Treaty with the Dwamish, Suquamish *et al.*, Jan. 22, 1855, 12 Stat. 927) incorporated by reference Article 6 of the Treaty with the Omaha, Mar. 16, 1854, 10 Stat. 1043, which provided that allotments

> shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such land within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. . . . No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

to specific later Acts of Congress. *Id.*; *see also id.* at 1356-57 (citing 25 U.S.C. § 372); *id.* at 1360 (Beezer, J., dissenting) (same). *Lummi* did not consider a case like this one, where the treaty itself preserves immunity from taxation, and land became alienable under the terms of the treaty itself rather than pursuant to any later congressional action. There is no reason to assume that the Ninth Circuit, faced with facts similar to those here, would reach a result different from the one reached by the Sixth Circuit in this case.

4. Petitioners argue secondarily that the courts below somehow erred in resolving this case on summary judgment. Pet. 9-11. That is incorrect. Contrary to Petitioners' suggestion, the parties' experts disagreed only about the legal conclusion of how the 1854 Treaty should be interpreted in light of an undisputed historical record. Pet. App. 20a-22a. Indeed, Petitioners themselves initiated the cross-motions for summary judgment that led to the decisions below. In their brief in support of their motion in the district court, Petitioners asserted that "[s]ummary judgment under Fed. R. Civ. Pro. 56 is . . . appropriate as a matter of law on whether [the] state can impose an *ad valorem* property tax on the land in this case," that its claims involved "a pure question of law," that "[s]ummary judgment is appropriate on these types of issues because there is no genuine issue of material fact," and that "the Community has failed to raise a genuine issue of material fact sufficient to avoid dismissal with prejudice." *See* Defs.' Br. Supp. Mot. Dismiss and/or Summ. J. at 3, 11, 19, R. 62, 6th Cir. App. 361, 363, 371, 379. Likewise, during the hearing on the cross-motions, Petitioners informed the court that no fact issues remained that would prevent the issuance of summary judgment. Transcript of 2005 Motion Hearing at 61-62, R. 105, 6th Cir. App. 727, 787-88. Reviewing the summary judgment record

submitted by the parties, each lower court applied established legal rules of treaty interpretation and explained why those rules supported the Community's interpretation as a matter of law. Pet. App. 13a-22a, 40a-48a. Petitioners' procedural argument provides no basis for further review.

5. Even if there were grounds to question the outcome below (which there are not), this case is not of sufficient general importance to warrant review. The court of appeals' decision is unlikely to have any impact beyond the L'Anse Reservation. The vast majority of the fee land within Indian reservations in the United States – even land that was originally allotted pursuant to the terms of a treaty – became alienable pursuant to the General Allotment Act or other post-treaty congressional enactments.[4] Moreover, so far as the Community's counsel are aware (after substantial inquiry), the guarantee against involuntary removal provided in Article 11 of the 1854 Treaty, which the courts below properly construed to preserve tax immunity even for land made alienable under the Treaty, is unique among extant Indian treaties. While Congress no doubt has the power to modify or abrogate the Community's treaty immunity should it choose to do so, there is no reason for intervention by this Court.

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4. *See* <http://www.indianlandtenure.org/ILTFallotment/specinfo/specinfo.htm> (detailed charts available by clicking map) (visited Oct. 25, 2006).

## CONCLUSION

The petition for a writ of certiorari should be denied.

October, 2006

Respectfully submitted,

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# APPENDIX

# APPENDIX

## TREATY WITH THE CHIPPEWA, 1854.

*Articles of a treaty made and concluded at La Pointe, in the State of Wisconsin, between Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and head-men.*

ARTICLE 1. The Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of the Mississippi, lying east of the following boundary-line, to wit: Beginning at a point, where the east branch of Snake River crosses the southern boundary-line of the Chippewa country, running thence up the said branch to its source, thence nearly north, in a straight line, to the mouth of East Savannah River, thence up the St. Louis River to the mouth of East Swan River, thence up the East Swan River to its source, thence in a straight line to the most westerly bend of Vermillion River, and thence down the Vermillion River to its mouth.

The Chippewas of the Mississippi hereby assent and agree to the foregoing cession, and consent that the whole amount of the consideration money for the country ceded above, shall be paid to the Chippewas of Lake Superior, and in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundry-line.

*Appendix*

ARTICLE 2. The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz:

1st. For the L'Anse and Vieux De Sert bands, all the unsold lands in the following townships in the State of Michigan: Township fifty-one north range thirty-three west; township fifty-one north range thirty-two west; the east half of township fifty north range thirty-three west; the west half of township fifty north range thirty-two west, and all of township fifty-one north range thirty-one west, lying west of Huron Bay.

2d. For the La Pointe band, and such other Indians as may see fit to settle with them, a tract of lar ' bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the centre of township forty-seven north, thence west to the west line of said township, thence south to the southeast corner of township forty-six north, range thirty-two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north to the lake shore, and thence along the lake shore, crossing Shag-waw-me-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground.

3d. For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the

boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

4th. For the Fond Du Lac bands, a tract of land bounded as follows: Beginning at an island in the St. Louis River, above Knife Portage, called by the Indians Paw-paw-sco-me-me-tig, running thence west to the boundary-line heretofore described, thence north along said boundary-line to the mouth of Savannah River, thence down the St. Louis River to the place of beginning. And if said tract shall contain less than one hundred thousand acres, a strip of land shall be added on the south side thereof, large enough to equal such deficiency.

5th. For the Grand Portage band, a tract of land bounded as follows: Beginning at a rock a little east of the eastern extremity of Grand Portage Bay, running thence along the lake shore to the mouth of a small stream called by the Indians Maw-ske-gwaw-caw-maw-se-be, or Cranberry Marsh River, thence up said stream, across the point to Pigeon River, thence down Pigeon River to a point opposite the starting-point, and thence across to the place of beginning.

6th. The Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief, may each select, on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter. And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land, at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed

by the United States to su h person or persons as he may direct.

7th. Each bead of a family, or single person over twenty-one years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

ARTICLE 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

*Appendix*

ARTICLE 4. In consideration of and payment for the country hereby ceded, the United States agree to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums, to wit: five thousand dollars in coin; eight thousand dollars in goods, household furniture and cooking utensils; three thousand dollars in agricultural implements and cattle, carpenter's and other tools and building materials, and three thousand dollars for moral and educational purposes, of which last sum, three hundred dollars per annum shall be paid to the Grand Portage band, to enable them to maintain a school at their village. The United States will ~~also pay~~ the further sum of ninety thousand dollars, as the chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of six thousand dollars, in agricultural implements, household furniture, and cooking utensils, to be distributed at the next annuity payment, among the mixed bloods of said nation. The United States will also furnish two hundred guns, one hundred rifles, five hundred beaver-traps, three hundred dollars' worth of ammunition, and one thousand dollars' worth of ready-made clothing, to be distributed among the young men of the nation, at the next annuity payment.

ARTICLE 5. The United States will also furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments, and as much longer as the President may think proper, at each of the points herein set apart for the residence of the Indians, the same to be in lieu of all the employees to which the Chippewas of Lake Superior may be entitled under previous existing treaties.

ARTICLE 6. The annuities of the Indians shall not be taken to pay the debts of individuals, but satisfaction for depredations committed by them shall be made by them in such manner as the President may direct.

ARTICLE 7. No spirituous liquors shall be made, sold, or used on any of the lands herein set apart for the residence of the Indians, and the sale of the same shall be prohibited in the Territory hereby ceded, until otherwise ordered by the President.

ARTICLE 8. It is agreed, between the Chippewas of Lake Superior and the Chippewas of the Mississippi, that the former shall be entitled to two-thirds, and the latter to one-third, of all benefits to be derived from former treaties existing prior to the year 1847.

ARTICLE 9. The United States agree that an examination shall be made, and all sums that may be found equitably due to the Indians, for arrearages of annuity or other thing, under the provisions of former treaties, shall be paid as the chiefs may direct.

ARTICLE 10. All missionaries, and teachers, and other persons of full age, residing in the territory hereby ceded, or upon any of the reservations hereby made by authority of law, shall be allowed to enter the land occupied by them at the minimum price whenever the surveys shall be completed to the amount of one quarter-section each.

ARTICLE 11. All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La

Pointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

ARTICLE 12. In consideration of the poverty of the Bois Forte Indians who are parties to this treaty, they having never received any annuity payments, and of the great extent of that part of the ceded country owned exclusively by them, the following additional stipulations are made for their benefit. The United States will pay the sum of ten thousand dollars, as their chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of ten thousand dollars, in five equal annual payments, in blankets, cloth, nets, guns, ammunition, and such other articles of necessity as they may require.

They shall have the right to select their reservation at any time hereafter, under the direction of the President; and the same may be equal in extent, in proportion to their numbers, to those allowed the other bands, and be subject to the same provisions.

They shall be allowed a blacksmith, and the usual smithshop supplies, and also two persons to instruct them in farming, whenever in the opinion of the President it shall be proper, and for such length of time as he shall direct.

It is understood that all Indians who are parties to this treaty, except the Chippewas of the Mississippi, shall hereafter be known as the Chippewas of Lake Superior.

*Provided,* That the stipulation by which the Chippewas of Lake Superior relinquishing their right to land west of the boundary-line shall not apply to the Bois Forte band who are parties to this treaty.

ARTICLE 13. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Henry C. Gilbert, and the said David B. Herriman, commissioners as aforesaid, and the undersigned chiefs and headmen of the Chippewas of Lake Superior and the Mississippi, have hereunto set their hands and seals, at the place aforesaid, this thirtieth day of September, one thousand eight hundred and fifty-four.

HENRY C. GILBERT,
DAVID B. HERRIMAN,
*Commissioners.*

RICHARD M. SMITH, *Secretary.*

*Appendix*

*La Pointe Band.*

| | | |
|---|---|---|
| KE-CHE-WAISH-KE, or the Buffalo, 1st chief, | his x mark. | [L.S.] |
| CHAY-CHE-QUE-OH, 2d chief, | his x mark. | [L.S.] |
| A-DAW-WE-GE-ZHICK, or Each Side of the sky, 2d chief, | his x mark. | [L.S.] |
| O-SKE-NAW-WAY, or the Youth, 2d chief, | his x mark. | [L.S.] |
| MAW-CAW-DAY-PE-NAY-SE, or the Black Bird, 2d chief, | his x mark. | [L.S.] |
| NAW-WAW-NAW-QUOT, headman, | his x mark. | [L.S.] |
| KE-WAIN-ZEENCE, headman, | his x mark. | [L.S.] |
| WAW-BAW-NE-ME-KE, or the White Thunder, 2d chief, | his x mark. | [L.S.] |
| PAY-BAW-ME-SAY, or the Soarer, 2d chief, | his x mark. | [L.S.] |
| NAW-WAW-GE-WAW-NOSE, or the Little Current, 2d chief, | his x mark. | [L.S.] |
| MAW-CAW-DAY-WAW-QUOT, or the Black Cloud, 2d chief, | his x mark. | [L.S.] |
| ME-SHE-NAW-WAY, or the Disciple, 2d chief, | his x mark. | [L.S.] |
| KEY-ME-WAW-NAW-UM, headman, | his x mark. | [L.S.] |
| SHE-GOG, headman, | his x mark. | [L.S.] |

*Appendix*

*Ontonagon Band.*

| | | |
|---|---|---|
| O-CUN-DE-CUN, or the Buoy 1st chief, | his x mark. | [L.S.] |
| WAW-SAY-GE-ZHICK, or the Clear Sky, 2d chief, | his x mark. | [L.S.] |
| KEESH-KE-TAW-WUG, headman, | his x mark. | [L.S.] |

*L'Anse Band.*

| | | |
|---|---|---|
| DAVID KING, 1st chief, | his x mark. | [L.S.] |
| JOHN SOUTHWIND, headman, | his x mark. | [L.S.] |
| PETER MARKSMAN, headman, | his x mark. | [L.S.] |
| NAW-TAW-ME-GE-ZHICK, or the First Sky, 2d chief, | his x mark. | [L.S.] |
| AW-SE-NEECE, headman, | his x mark. | [L.S.] |

*Vieux De Sert Band.*

| | | |
|---|---|---|
| MAY-DWAY-AW-SHE, 1st chief, | his x mark. | [L.S.] |
| POSH-QUAY-GIN, or the Leather, 2d chief, | his x mark. | [L.S.] |

*Appendix*

*Grand Portage Band.*

| | | |
|---|---|---|
| SHAW-GAW-NAW-SHEENCE, or the Little Englishman, 1st chief, | his x mark. | [L.S.] |
| MAY-MOSH-CAW-WOSH, headman, | his x mark. | [L.S.] |
| AW-DE-KONSE, or the Little Reindeer, 2d chief, | his x mark. | [L.S.] |
| WAY-WE-GE-WAM, headman, | his x mark. | [L.S.] |

*Fond Du Lac Band.*

| | | |
|---|---|---|
| SHING-GOOPE, or the Balsom, 1st chief, | his x mark. | [L.S.] |
| MAWN-GO-SIT, or the Loon's Foot, 2d chief, | his x mark. | [L.S.] |
| MAY-QUAW-ME-WE-GE-ZHICK, headman, | his x mark. | [L.S.] |
| KEESH-KAWK, headman, | his x mark. | [L.S.] |
| CAW-TAW-WAW-BE-DAY, headman, | his x mark. | [L.S.] |
| O-SAW-GEE, headman, | his x mark. | [L.S.] |
| KE-CHE-AW-KE-WAIN-ZE, headman, | his x mark. | [L.S.] |
| NAW-GAW-NUB, or the Foremost Sitter, 2d chief, | his x mark. | [L.S.] |
| AIN-NE-MAW-SUNG, 2d chief, | his x mark. | [L.S] |
| NAW-AW-BUN-WAY, headman, | his x mark. | [L.S.] |

*Appendix*

| | | |
|---|---|---|
| WAIN-GE-MAW-TUB, headman, | his x mark. | [L.S.] |
| AW-KE-WAIN-ZEENCE, headman, | his x mark. | [L.S.] |
| SHAY-WAY-BE-NAY-SE, headman, | his x mark. | [L.S.] |
| PAW-PE-OH, headman, | his x mark. | [L.S.] |

*Lac Court Oreille Band.*

| | | |
|---|---|---|
| AW-KE-WAIN-ZE, or the Old Man, 1st chief, | his x mark. | [L.S.] |
| KEY-NO-ZHANCE, or the Little Jack Fish, 1st chief, | his x mark. | [L.S.] |
| KEY-CHE-PE-NAY-SE, or the Big Bird, 2d chief, | his x mark. | [L.S.] |
| KE-CHE-WAW-BE-SHAY-SHE, or the Big Martin, 2d chief, | his x mark. | [L.S.] |
| WAW-BE-SHAY-SHEENCE, headman, | his x mark. | [L.S.] |
| QUAY-QUAY-CUB, headman, | his x mark | [L.S.] |
| SHAW-WAW-NO-ME-TAY, headman, | his x mark. | [L.S.] |
| NAY-NAW-ONG-GAY-BE, or the Dressing Bird,1st chief, | his x mark. | [L.S.] |
| O-ZHAW-WAW-SCO-GE-ZHICK, or the Blue Sky, 2d chief, | his x mark. | [L.S.] |
| I-YAW-BANSE, or the Little Buck, 2d chief, | his x mark. | [L.S.] |
| KE-CHE-E-NIN-NE, headman, | his x mark. | [L.S.] |
| HAW-DAW-GAW-ME, headman, | his x mark. | [L.S.] |
| WAY-ME-TE-GO-SHE, headman, | his x mark. | [L.S.] |
| PAY-ME-GE-WUNG, headman, | his x mark. | [L.S.] |

*Appendix*

*Lac Du Flambeau Band.*

| | | |
|---|---|---|
| AW-MO-SE, or the Wasp, 1st chief, | his x mark. | [L.S.] |
| KE-NISH-TE-NO, 2d chief, | his x mark. | [L.S.] |
| ME-GEE-SEE, OR THE EAGLE, 2d chief, | his x mark. | [L.S.] |
| KAY-KAY-CO-GWAW-NAY-AW-SHE, headman, | his x mark. | [L.S.] |
| O-CHE-CHOG, headman, | his x mark. | [L.S.] |
| NAY-SHE-KAY-GWAW-NAY-BE, headman, | his x mark. | [L.S.] |
| O-SCAW-BAY-WIS, or the Waiter, 1st chief, | his x mark. | [L.S.] |
| QUE-WE-ZANCE, or the White Fish, 2d chief, | his x mark. | [L.S.] |
| NE-GIG, or the Otter, 2d chief, | his x mark. | [L.S.] |
| NAY-WAW-CHE-GE-GHICK-MAY-BE, headman, | his x mark. | [L.S.] |
| QUAY-QUAY-KE-CAH, headman, | his x mark. | [L.S.] |

*Bois Forte Band.*

| | | |
|---|---|---|
| KAY-BAISH-CAW-DAW-WAY, or Clear Round the Prairie, 1st chief, | his x mark. | [L.S.] |
| WAY-ZAW-WE-GE-ZHICK, SKING, headman, | his x mark. | [L.S.] |
| O-SAW-WE-PE-NAY-SHE, headman, | his x mark. | [L.S.] |

*Appendix*

*The Mississippi Bands.*

| | | |
|---|---|---|
| QUE-WE-SAN-SE, or Hole in the Day, head chief, | his x mark. | [L.S.] |
| CAW-NAWN-DAW-WAW-WIN-ZO, or the Berry Hunter, 1st chief, | his x mark. | [L.S.] |
| WAW-BOW-JIEG, or the White Fisher, 2d chief, | his x mark. | [L.S.] |
| OT-TAW-WAW, 2d chief, | his x mark. | [L.S.] |
| QUE-WE-ZHAN-CIS, or the Bad Boy, 2d chief, | his x mark. | [L.S.] |
| BYE-A-JICK, or the Lone Man, 2d chief, | his x mark. | [L.S.] |
| I-YAW-SHAW-WAY-GE-ZHICK, or the Crossing Sky, 2d chief, | his x mark. | [L.S.] |
| MAW-CAW-DAY, or the Bear's Heart, 2d chief, | his x mark. | [L.S.] |
| KE-WAY-DE-NO-GO-NAY-BE, or the Northern Feather, 2d chief, | his x mark. | [L.S.] |
| ME-SQUAW-DACE, headman, | his x mark. | [L.S.] |
| NAW-GAW-NE-GAW-bo, headman, | his x mark. | [L.S.] |
| WAWM-BE-DE-YEA, headman, | his x mark. | [L.S.] |
| WAISH-KEY, headman, | his x mark. | [L.S.] |
| CAW-WAY-CAW-ME-GE-SKUNG, headman, | his x mark. | [L.S.] |
| MY-YAW-GE-WAY-WE-DUNK, or the One who carries the Voice, 2d chief, | his x mark. | [L.S.] |

*Appendix*

John F. Godfroy,
Geo. Johnston,
S.A. Marvin,
Louis Codot, *Interpreters.*
Paul H. Beaulieu,
Henry Blatchford,
Peter Floy,

Executed in the presence of

Henry M. Rice,
J.W. Lynde,
G.D. Williams,
B.H. Connor,
E.W. Muldough,
Richard Godfroy,
D.S. Cash,
H.H. McCullough,
E. Smith Lee,
Wm. E. Vantassel,
L.H. Wheeler.